RECORD, CASE No. 14[illegible]

SUPREME COURT OF THE UNITED S[illegible]

OCTOBER TERM, 1[illegible]

TERM No., 6[illegible] 130

THE VILLAGE OF HOLLY, PLAINTIFF IN [illegible]

vs.

GEORGE F. HUNTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STA[illegible]
THE EASTERN DISTRICT OF MICHIGAN.

FILED JULY 2, 1900.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between George F. Hunter, plaintiff, and The Village of Holly, defendant, a manifest error hath happened, to the great damage of the said defendant, The Village of Holly, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, Eastern District of Michigan.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifth day of April, in the year of our Lord one thousand eight hundred and ninety.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—
H. B. BROWN.

[Endorsed:] Supreme Court U. S. The Village of Holly, plaintiff in error, *v.* George F. Hunter, defendant in error. Writ of error. Filed April 5, 1890. Walter S. Harsha, clerk. F. A. Baker, att'y for plaintiff in error.

b *Bond on Writ of Error.*

Know all men by these presents that we, "The Village of Holly," a municipal corporation, and Harry W. Downing, Livingstone Axford, Charles F. Collier, Howard M. Church, Phil. Calkins, Evans Buzzell, Reuben C. Smith, James C. Simonson, James Slocum, Sylvester D. Mosher, George W. Johnson, Edward D. Bussey, Chauncey Stuart, John Lacy, John M. Baird, Morton B. Burgys, De Witt C. Wade, and Ebenezer L. Patterson, as sureties, are held and firmly bound unto George F. Hunter in the full and just sum of twenty thousand dollars, to be paid to the said George F. Hunter, cer-

tain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between the said George F. Hunter, plaintiff, and The Village of Holly, defendant, a judgment was rendered against the said The Village of Holly for ten thousand dollars damages and costs of suit, and the said The Village of Holly having sued out a writ of error from the Supreme Court of the United States to review and reverse said judgment, — having obtained a citation directed to the said George F. Hunter, defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Village of Holly, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE VILLAGE OF HOLLY,	[SEAL.]
By C. F. COLLIER, *President.*	[SEAL.]
LIVINGSTONE AXFORD.	[SEAL.]
H. W. DOWNING.	[SEAL.]
CHARLES F. COLLIER.	[SEAL.]
H. M. CHURCH.	[SEAL.]
PHIL. CALKINS.	[SEAL.]
EVANS BUZZELL.	[SEAL.]
R. C. SMITH.	[SEAL.]
JAS. C. SIMONSON.	[SEAL.]
JAMES SLOCUM.	[SEAL.]
S. D. MOSHER.	[SEAL.]
G. W. JOHNSON.	[SEAL.]
E. D. BUSSEY.	[SEAL.]
JAS. H. CUMMINGS.	[SEAL.]
CHAUNCEY STUART.	[SEAL.]
JOHN LACY.	[SEAL.]
JNO. M. BAIRD.	[SEAL.]
M. B. BURGYS.	[SEAL.]
DE W. C. WADE.	[SEAL.]
I. L. PATTERSON.	[SEAL.]

Sealed and delivered in presence of—

—— ——.
—— ——.
—— ——.

Approved by—
H. B. BROWN.

Filed April 5, 1890.

WALTER S. HARSHA, *Clerk.*

d THE UNITED STATES OF AMERICA:

To George F. Hunter, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein The Village of Holly is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, district judge and one of the judges of the circuit court of the United States for the eastern district of Michigan, this 5th day of April, in the year of our Lord one thousand eight hundred and ninety.

HENRY B. BROWN,
District Judge.

e [Endorsed:] Supreme Court U. S. The Village of Holly, plaintiff in error, *v.* George F. Hunter, def't in error. Citation. F. A. Baker, att'y for plaintiff in error.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 8th day of April, in the year of our Lord one thousand eight hundred and ninety, personally appeared Charles F. Collier before me, the subscriber, a notary public in and for the county of Oakland, in said State and district, and makes oath that he delivered a true copy of the within citation to George F. Hunter, the within-named defendant in error, personally, on the 8th day of April, 1890, at the village of Holly, in said county.

CHARLES F. COLLIER.

Sworn to and subscribed the eighth day of April, A. D. 1890.

[Seal Edward E. Brewster, Notary Public, Oakland Co., Mich.]

EDWARD E. BREWSTER,
Notary Public, Oakland Co., Mich.

1 *Declaration.*

The Circuit Court of the United States for the Eastern District of Michigan.

UNITED STATES OF AMERICA,
Eastern District of Michigan, } *ss:*

George F. Hunter, an alien and a subject of Victoria, Queen of Great Britain and Ireland, and a resident of said district, plaintiff in this suit, by Taft and Smith, his attorneys, complains of The Village of Holly, a body corporate and a citizen of the State of Michigan, de-

fendant in this suit, of a plea of trespass on the case, filing this declaration at commencement of suit:

For that whereas the said defendant before and at the time of the committing of the grievances hereinafter mentioned was and still is an incorporated village in the county of Oakland, in said district, having a large population, to wit, thirteen hundred; that one of the streets in said village is called and known as Oakland street, which said street at the time of the committing of such grievances and from thence hereto hath been and still is a public street and highway for all persons to go, return, pass, and repass in, by, and through at their free will and pleasure, to wit, at said village of Holly; yet the said defendant, well knowing the premises, by its officers, duly elected and qualified, to wit, on the 23d day of November, A. D. 1886, wrongfully and unjustly and negligently allowed and permitted one William Quick to draw a barn through said street and have a capstan in the middle of said street in front of the premises occupied by James H. Cummings, and wrongfully and injuriously and negligently allowed said William Quick to have said capstan in the said street and during the night-time of that day without fixing
2 or placing or causing to be fixed or placed any light or signal at or near said obstruction to denote or show that the same was there as aforesaid, by means and in consequence of which said negligence and improper conduct of the said defendant afterwards, to wit, in the night-time of the twenty-third day of November, A. D. 1886, to wit, at the village of Holly, in the said county of Oakland aforesaid, said plaintiff, while driving in and through said street in a careful and prudent manner with his horse and buggy aforesaid, and without the fault or negligence of the plaintiff, ran against the said obstruction and capstan so allowed to remain upon the said streest as aforesaid and was thereby then and there thrown from his buggy upon the said obstruction and capstan, by means whereof the said plaintiff then and there became and was greatly hurt, cut, bruised, and wounded, sick, sore, lame, blind, deaf, paralyzed, and disordered and to remained and continued for a long space of time, to wit, until the commencement of this suit, during all of which time he, the said plaintiff, thereby suffered and underwent great pain and was thereby then and there hindered and prevented from performing and transacting his lawful business and profession, to wit, that of a practicing physician, by him during that time to be performed and transacted, and also in consequence of said injury said plaintiff lost his health, hearing, eyesight, memory, and ability to ever again work as a physician, and was otherwise greatly damaged and injured, to the damage of said plaintiff twenty-five thousand dollars.

And also for that whereas theretofore, to wit, on the twenty-third day of November, A. D. 1886, and for a long time prior thereto, the said defendant, The Village of Holly, was and now is an in-
3 corporated village organized under and by virtue of the laws of the State of Michigan, and which said village is laid out in streets, lanes, and alleys, with walks on the sides thereof, for the use and convenience of persons travelling on foot and with teams, one of which streets is known as Oakland street; yet the said de-

fendant, well knowing the premises, at said township of Holly, on the twenty-third day of November, A. D. 1886, in the evening of said day, at about, to wit, seven o'clock p. m. of said day, and for a long time prior thereto wrongfully, negligently, knowingly, and injuriously allowed and suffered a certain capstan to be and remain in the center of said Oakland street, at or nearly in front of the land occupied by James H. Cummings, with no light or signal at or near said capstan to denote or show the same was there as aforesaid; said capstan was a large machine and said negligence rendered said street dangerous and unsafe to travelers, in consequence of which said negligence and improper conduct of the said defendant in that respect afterwards, to wit, in the night-time of the said twenty-third day of November, A. D. 1886, to wit, the village of Holly, in said county aforesaid, said plaintiff then and there driving and passing in and through the said street in a careful and prudent manner, in a westerly direction on said Oakland street, and without the fault or negligence of this plaintiff, his horse fell, stumbled, and threw him upon and over the said capstan in and upon the said street, by means whereof the said plaintiff then and there became and was greatly *jurt*, *dut*, bruised, and wounded, sick, sore, lame, paralyzed, and disordered, and so remained and continued for a long space of time, to wit, from the last day first aforesaid to and including this day, during all of which time he, the said plaintiff, thereby
4 suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs, profession, and business as a practising physician, and will hereafter, to wit, during his natural life, suffer and undergo great pain, and also by means of the said premises he, the said plaintiff, lost his health, hearing, memory, eyesight, and ability to ever work again in his profession, and was then and there thereby put to great expense, costs, and charges, in the whole amounting to a large sum of money, to wit, the sum of five thousand dollars, in and about endeavoring to be cured of the said wounds, sickness, lameness, and disorder so occasioned as aforesaid, to wit, in the village of Holly, in the county aforesaid.

To the damage of the said plaintiff twenty-five thousand dollars; therefore he brings this suit, &c.

TAFT & SMITH,
Attorneys for Plaintiff.

To the within-named defendant:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the Book of Common Rules, kept by the cle*k*r of said court in his office, in the city of Detroit, requiring you to appear and plead to said declaration within twenty days (20) after service on you of a copy thereof and notice of said rule or judgment.

Yours, TAFT AND SMITH,
Pl'ff's Attorneys.

Sept. 14, 1887.

5 *Rule to Plead.*

In the Circuit Court of the United States for the Eastern District of Michigan.

GEORGE F. HUNTER
vs.
THE VILLAGE OF HOLLY.

On filing declaration in this cause as commencement of suit and on motion of Taft & Smith, attorneys for the plaintiff, it is ordered that the said defendant appear and plead or demur to said declaration within 20 days after service of a copy thereof and notice of the entry of this rule or judgment, &c.

WALTER S. HARSHA, *Clerk.*

TAFT & SMITH,
Att'ys for Pl'ff.

6 *Plea and Notice.*

UNITED STATES:

In the Circuit Court of the United States for the Eastern District of Michigan.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

And the said defendant, by Charles F. Collier, its attorney, demands a trial of the matters set forth in the plaintiff's declaration.

CHARLES F. COLLIER,
Attorney for Defendant.

To said plaintiff:

Take notice that the defendant will prove, under the general issue above pleaded, that the said plaintiff, George F. Hunter, is not an alien, but is a citizen of the United States of America and a resident of the State of Michigan, and that the said court has no jurisdiction in this cause.

CHARLES F. COLLIER,
Attorney for Defendant.

F. A. BAKER, *Of Counsel.*

Holly, Sept. 22nd, 1887.

Filed Oct. 1, 1887.

WALTER S. HARSHA, *Clerk.*

7 *Jury Trial.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday,

the sixteenth day of July, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge, and the Honorable Howell E. Jackson, circuit judge.

Before full bench.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

The parties in this cause, being in court, by their respective attorneys, ready for trial, consent to proceed with a jury selected from the city of Detroit, and thereupon comes a jury, namely, Samuel C. Browning, A. S. Lane, George W. Wilson, George W. Williams, T. C. Manchester, Edward M. McDonald, John Millen, George R. Tuttle, Abram C. Frazer, Henry Knowles, Jacob Silberman, and R. J. McDonald, good and lawful men, who are duly impaneled, tried, and sworn well and truly to try the issue between the parties and sit together and hear a portion of the evidence in the case.

8 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the seventeenth day of July, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry B. Brown, district judge.

Before full bench.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear further evidence in the case.

9 *Verdict.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the eighteenth day of July, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry B. Brown, district judge.

Before full bench.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

In this cause the jurors heretofore impaneled and sworn come *tino* court again and sit together, and, after hearing the conclusion of the evidence in the case, the arguments of counsel, and the chrage of the court, retire, under the charge of an officer of the court, duly sworn for the purpose, to consider of their verdict to be given, and, after being absent for a time, return into court and say upon their oath that the said defendant is guilty of the premises in the plaintiff's declaration in this cause laid to its charge in manner and form as the said plaintiff has therein alleged, and they assess the damages of the said plaintiff by reason thereof at the sum of ten thousand dollars.

10 *Judgment.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the twenty-fifth day of July, in the year one thousand eighty hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

The jury by whom the issue in this case was tried having rendered a verdict in favor of said plaintiff and against said defendant for ten thousand dollaars damages, now, on motion of Mr. W. L. Carpenter, of counsel for the plaintiff, it is by the court now here considered that the said plaintiff do recover against the said defendant his damages aforesaid, ten thousand dollars, together with his costs and charges by him about his suit in this behalf expended, to be taxed, and that said plaintiff have execution therefor.

11 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the thirtieth day of November, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

On motion of Mr. F. A. Baker, attorney for defendant, the time to settle a bill of exceptions is hereby extended until Dec. 15th next.

12 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the fourteenth day of December, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

On motion of Mr. F. A. Baker, attorney for defendant, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended until 23d inst.

13 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-third day of December, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

GEORGE F. HUNTER
vs.
VILLAGE OF HOLLY.

On motion of defendant's attorney, the time to settle a bill of exceptions is hereby extended 5 days.

14 UNITED STATES OF AMERICA:

Bill of Exceptions.

In the Circuit Court of the United States for the Eastern District of Michigan.

GEORGE F. HUNTER
vs.
THE VILLAGE OF HOLLY.

The issue joined in this cause came on for trial before the Honorable Henry B. Brown, district judge, and a jury duly empaneled to try said issue; and thereupon the plaintiff, to maintain said issue on his part, introduced the following testimony:

GEORGE F. HUNTER, the plaintiff, being duly sworn in his own behalf, testified that he is about thirty-nine years of age and has resided in the village of Holly about eleven years; that he is a physician and surgeon; that he has been practising medicine for about fifteen years; that he graduated from the University of Buffalo, N. Y., and also at Toronto, Ontario; that he has practiced medicine in Clyde, Michigan, and Holly, Michigan, and he was injured in the village of Holly on the 23d day of November, 1886,

on Oakland street, as he was driving down that street to see a patient about half past six in the evening; that the most important street in Holly is Saginaw street; the next in importance is Broad street, and *the* probably Oakland street is next in importance, so far as travel is concerned; that it had been storming and raining some and freezing that afternoon and evening; that he was driving down that street at about half past six in the evening and his horse and buggy struck a capstan on the middle of the street; that it was very dark and he did not see the capstan and presumes that his horse did not see it; at any rate she ran over one side of it and the buggy struck one side of it, the horse fell and partially turned the buggy over and threw him out against the capstan; that he was injured in a number of places, his leg was injured, his knee was injured, and there was a bruise on his left eye, and another injury on the right side of his head. These were the principal injuries. That he was probably travelling seven or eight miles an hour; that he went west on East street and then north onto Oakland street, and then went west; that when he turned the corner he went west about two hundred feet before he struck the capstan; that he drove on the north or right-hand side of the capstan; that he did not know whether there was anything between the capstan and building or not; that it was very dark; that the ground was partially frozen, so it sank a little. There was a crust on the surface. That after being injured he went about a block further straight west on same street to the house he was going to, Mr. McDonald's; that he was there to see his wife, who was sick; that he went there, went into the house, and remained a few minutes, but did not take off his overcoat; that he drove home; that Mr. McDonald was waiting at home with a lantern when he drove up to the house and assisted him, tied his horse, and helped him into the house; that he went home and his hired man helped him into the house and took charge of his horse; that he began feeling his injuries more at that time than he had before; that he went into the house and sent for Dr. Bartholomew; that the doctor came up and attended to his injuries and put a bandage on his limb that was injured—his left knee; that he was confined to his bed at this time about a month; that after that he was unable to go out to see his patients, but went down afternoons to his office sometimes, and that he continued to do that until February 23d following; that he had a relapse of the paralysis on the same day; that after he was injured, on November 23d, Dr. McGraw, of Detroit, Dr. Wade, of Holly, and Dr. Felshaw saw him, besides Dr. Bartholomew; that Dr. Wade put a plaster-paris cast on his knee; that it was put there to keep it still, in order to allow the inflam-ation to subside; that there was inflam-ation in the joint; that the plaster-paris cast was put on about a week after the first injury and was on about six weeks; that after the relapse, February 23, 1887, he had to go to bed; that he was paralyzed; that the paralysis arose from an injury to the brain; that his arm was entirely paralyzed and his side partially paralyzed and his leg and foot were partially paralyzed

the second time; that after the injury there were tests applied to him to see in what condition his foot, leg, and arm were; that the doctors examined him several times; that the electric battery was applied to test the paralysis to see if it was paralyzed; that at that time, February 23, 1887, Dr. McGraw, Dr. Wade, and Dr. Felshaw saw him; that there was no hearing in that ear; that his health before the injury was good; that his hearing and eyesight were perfect; that his books would show his practice was worth from four to six thousand dollars a year; that he should safely say that two-thirds was collectable and probably more than that; that he should think he was able to collect four thousand dollars a year; that since that he has not been able to do much of anything; cannot ride—has tried it several times; that it affects his spine, which he forgot to say was injured at the same time; that the fifth vertebræ was injured and is very tender, so if he rides in a buggy the jarring makes him sick; that Dr. McGraw advised him not to prac-
17 tice at all, advised him to go to California or change of climate somewhere; that he did not, because he had this case on his hands for one thing and he was not financially prepared to go; that he went to London, Ontario, and remained two or three months to recover his health; that he tried every way possible to recover his health; tried rowing some to strengthen his muscles; thought it did him good; the physical exercise was good for him the way he took it—with moderation.

Cross-examination:

That he was born *h*ear St. Mary's, Canada; that he resided at Clyde, Michigan, before he went to Holly in the fall of 1878; that he graduated from the Buffalo Medical College in the session of '80 and '81; before that time he had a diploma from the College of Physicians and Surgeons of Ontario, Canada, where he came from; that it is a regular medical college; that he had another diploma before that in '69; that he got it in Canada, too; that he did not have any of Dr. Buchannan's diplomas; that he practiced in Clyde; that he had known the Quick family before the accident; had attended them as a physician and knew them all. They live one mile and a half or two miles out of the village; became acquainted with them soon after he came to Holly; probably a year or two; knew that they were house-movers; had seen them move houses about the village during the time he had lived there; that it was customary for him to drive a good deal through the village; that when he went into the country he would go through the main streets, or one or two of them; that he lived on Maple street at the time he was hurt; that his office was over Church's drug store, and had been there ever since he had been at Holly, excepting when the building was rebuilt; that it was one of the most prominent corners
18 of the village; that he had seen buildings moved along the street in front of Church's drug store while he had his office there; that he had seen Quick Bros. move buildings in other parts of the village; that he was out in the country two miles and one-

half the afternoon of the accident and reached the village a little after six o'clock; that he came in on Broad street and drove up Saginaw street and Maple street and on East street until he came to Oakland street, and as he turned the corner did not see the Reynolds building; that it was so dark that he could hardly see his horse; could not see the capstan until after he was thrown out; that the street is sixty-six feet wide; had no idea there was any capstan there; there is no culvert or ditches on either side of the sidewalks to prevent from driving on either side of it; that between the hitching posts there is an open space something like fifty feet; that the capstan was right in the center of the highway where the buggies ran; that his horse seemed to run onto the braces and trip herself as she went over; that it threw him to the left side of the capstan; there was an injury on his head afterward; that he struck some of the timbers connected with the capstan; that he did not remember anything after he was thrown out until he was standing up by the hind wheel of the buggy with the lines in his hand. There was some one there at the time; that he shook the buggy to see if it was hanging together; got into it and it seemed to hang together, and he went on. One of the shafts of the buggy was broken. Some of the spokes were displaced; that after the relapse in February he was confined to his bed till May; that he then went to London, Ontario, and remained until July. On his return he was not able to resume practice. In September, 1888, he had a second attack. In the summer of 1887 he was advised to consult a specialist on diseases of the eye and ear. He consulted him
19 and was informed that the drum of his ear was ruptured and one-half of the optic nerve diseased; that the paralysis set in the evening of his injury; the paralysis was due to the injury of the head; that Doctor McGraw examined his urine three or four times after the first relapse to see whether he had Bright's disease; that the witness has also examined it himself; that he had Bright's disease; that the symptoms of Bright's disease are bloating, headache, pain in the head, weakness in the back, accompanied sometimes by vomiting; that the test is finding albumen and casts in the urine; that the disease is chronic or acute; that the Bright's disease with which the witness is affected is chronic, although it was acute, and that it will probably cause his death; that it is becoming worse.

Redirect examination:

That his spinal cord was injured, there being an enlargement there; that his nervous system was very much shattered; his pulse after the injury was 45 beats per minute; before it was 73 to 75; it is *not* 60 per minute.

That John Ford was street commissioner of the defendant corporation and Mr. Herrick was marshal; that James McConegal was president; Howard Church, Mr. Ripley, and Martin Chase, Martin Burges and Hugh Montgomery were trustees in 1886; that he saw the Reynolds building on Saginaw street on Monday; that he did

not see it on Oakland street; that he did not know where it was going; it was not guarded or lighted in any way.

20 E. R. BURK, sworn on behalf of plaintiff, testified that he lives in the township of Rose, about two and one-half miles south of the village of Holly; is a farmer, and worked at threshing in 1886; that he went to the village about every week; that he remembers of seeing the Bansett building being moved in 1886, when near the Andrews house, on Borad street; it was about dusk when he drove in town; that he did what business he had to do and started for home; Charles Kellogg and Frank Taggett were with him, and it was quite dark; that they ran into something that they used to move buildings with; that he should judge that it was four or six rods from the building and that there was no light or guards on it or the building; I think it was staked down, and he did not observe a chain or anything between the building and the capstan; that on the same evening he had a conversation with Lyman Herrick, the marshal of the village; that he told him that he had better have a light hung on that building than to be looking around after the boys; that he turned and walked on, and I did not understand what he said.

Cross-examination:

That when they went in the village they saw the Bansett building on Borad street, just north of the Andrews house; that he drove on the west side of the building to get around it; the capstan was nearer the hotel than the building; that he drove on the west side of the building, as there was a wider space there; that he could see plainly; that he could not say for certain whether there was a sweep in the capstan or not; could not say there was a chain attached to it; could not say positively whether it was staked down or not; that when he went in the village he merely drove by and

21 saw the capstan there without paying any particular attention to it; that he remained in town that night until somewhere about ten o'clock; that he hadn't ever run into the building or capstan before; that on returning they went on the same side of the capstan; did not run into the building or against it; did not break the buggy; there was no light on the Bansett building that night.

CHARLES KELLOGG, sworn, testified that he resides in the township of Rose, three and one-half miles south of the village of Holly; that he went *ot* Holly in the summer of 1886 with Ed. Burk, and remembers seeing them move the Bansett building; that the capstan was near the Andrews hotel, near Sherman street; remembers of running into the capstan that evening on going home; that he was driving and the capstan was from four to six rods south of the building; that there was no light or guard on the capstan or building; that he should think that the capstan was not far from the center of the street; should think it was staked down, at least he

could not loosen it when he got into it; that he was driving a double team on a lumber wagon; that he never saw them moving a building, but on other occasions had seen them on the street in the evening; that he does not know what building it was; that it was quite a little while before this; could not just exactly tell; that he never at any time saw a light on a capstan or building; that he don't just remember where the capstan was in reference to that building; that he could not name the building; the building he saw was on Saginaw street between Maple street and Martha street-; don't know where the capstan was; thinks it was north; could not place it; heard the conversation between Mr. Herrick
22 and Mr. Burk. Burk said to him he had better put a light on the building instead of watching the boys.

WALLACE G. JONES, sworn in behalf of plaintiff, testified that he lived in the village of Holly; a cigar-maker; has lived there the most of the time for twenty years; remembers the moving of the Reynolds building, November, 1886, and of hearing of Dp. Hunter's injury at the time, and knew where the building was the night before; that the building was a little south of the junction of Saginaw and Oakland streets; that the north end of the building came nearly to the intersection of Saginaw and Oakland streets; that the capstan was north of the north cross-walk on Saginaw street; that he should locate it ten feet from the sidewalk on east side of Saginaw street and ten feet north of the cross-walk, and a chain connected the capstan with the Reynolds building; that he crossed them in the morning about seven o'clock, and there was no one working around the building or the capstan at that time; that he should presume it was nearly five rods from the building; it was the width of Oakland street and perhaps ten feet north of the crossing; that the Reynolds barn was west of the center of Saginaw street; that he saw it there Monday about half past seven; that it was the night before the accident and it was dark; that he saw no light or guard on the building or capstan; that he had seen other buildings moved there during all the time that he has lived there; that he thinks that he has seen them lighted and not lighted; could hardly say how many he has seen lighted; in fact, don't know
23 how many times he has seen buildings moved; has seen them both lighted and unlighted in instances where they were moving and excavating in the streets.

JAMES H. PATTERSON, sworn in behalf of plaintiff, testified that he resides a mile and three-quarters northeast of Holly, and is a farmer and knows the Quicks; that he knows of their moving a building in the fall of 1886; the first one was in October and was the Donaldson building; that he saw the building on Saginaw street just north of Oakland, in front of Starker's, just north of Oakland street, about half past eight o'clock as he was going home; that he had a colt and she wanted to go, and as he turned around the building geed in and run astraddle of it; that the building was pretty near the center of the street; the capstan, he thinks, was

about three or four rods from the building; the chain was the only thing between the capstan and the building; there was no light upon either the building or the capstan; that he saw the Reynolds building on the night previous to the doctor's injury between six and eight o'clock as he was coming to the village; that the building was right south of Oakland street, about eight feet from the cross-walk, and the capstan was pretty close to the cross-walk.

Q. Where was the capstan with reference to being in the street on this Monday night?

A. Well, sir, I could not tell you. I do not think it was in the center of the road.

He thinks the capstan was a little to the west side of the center of the road; that there was no light or guard on the building at that time.

24 Cross-examination:

The Donaldson building was in the center of the road when he saw it; that it was quite a large building and he could see it easy enough; that he could not drive a horse into it; that when he got by the building he did not see the capstan; that the horse saw it; that the horse did not get tangled at all; that he saw the Reynolds building near the corner of Oakland and Saginaw streets and don't think it was partly turned around the corner when he saw it; it stood eight feet from the cross-walk that led over to the turn; the capstan was about half on the travelled part of the road; that he thinks it was staked on the opposite side of the cross-walk; there was plenty of room to go on the east side of it; that the road is a four-rod road; that the capstan was about a rod from the sidewalk on the west side of the street, about a rod from the fence; that he drove between the capstan and the west fence; that he testified on a former trial of this case; that he did not testify about the Reynolds barn because he wasn't asked to.

WILLIAM R. JONES, sworn on behalf of plaintiff, testified that he lived a mile and three-fourths south of the village of Holly; that his business is farming and he does his trading at Holly; that he saw the building known as the Bansett building in 1886 a little north of the Andrews hotel, between there and Cook's planing mill; that he went to the village a little after dark with a horse and buggy; that he returned home about half past ten o'clock; that he ran into the hind end of the Bansett building on Broad street; that when he started for home his horse ran up against the north end of the building; that he did not see the building; that the
25 horse ran into it; that he got out and took the horse by the bits and led her around and undertook to pull her into the road to start and run right square into the capstan next; that he didn't see any light on the building or capstan at the time; that he should think that the building was pretty near the center of the road; that he turned out and went around the west side of it; that he should judge that the capstan was pretty near the center of the road; that there was a chain between the capstan and the building;

that he had seen this same building on another street—on Sherman street; that he should judge that it was there a couple of weeks; that the capstan was ahead of the building; that he never saw a light on it; that he never saw a light on buildings being moved; that he never paid any particular attention to any but that one, because it was not on his road.

Cross-examination:

That the Bansett building was the only building he ever saw, and that he saw it in two different places; that the buggy thill struck the building going around it and broke the iron; that he could not tell how far the capstan was from the building; that when he saw the building on Sherman street he could not say how far the capstan was from the building; it may have been two or three rods; that the building and the capstan were both on the side of the street, but in the roadway; that he only saw the capstan there once; that there was plenty of space to go around it by daylight and the night, too, if it was not very dark; that he don't know how much danger there would be if the capstan was drawn up close to the building.

26 JOSEPH W. BELFORD, sworn in behalf of the plaintiff, testified that he resides in Holly, five miles north of the village; that he does his trading there; that he remembers of seeing the Reynolds building when it was being moved on the Monday night—when it was being moved previous to the doctor's injury; that he saw it when he came to town; that he went home along about eight o'clock; that there were no lights or guards on the building or capstan; that he could not say how far the capstan was from the building or whether any chain connected the capstan and the building; that when he drove out he drove on the west side of the building; that the barn was pretty near the corner, and the capstan was on the north side of the cross-walk—on the north side of Oakland street; could not say how far the capstan was beyond that; that the capstan was about in the center of the street—a little on the east side of the street, if anything; that it was nearer the east sidewalk than the west, if it was any; that he went on the west side of the building.

ALBERT M. TAYLOR, sworn on behalf of plaintiff, testified that he resides in Holly and is a farmer; that he lives north and west of the village; that he was at the village of Holly during the summer of 1886; that he remembers of seeing the Donaldson building when it was being moved along by Mr. Cook's residence; that he saw it between five and six o'clock that night; that he returned home about eight o'clock; that he saw the capstan about seventy-five or eighty feet north of the building; about in the center of the road; that neither had any light or guard or any protection on or around them; that he had a double team and lumber wagon; that he ran into the sweep which was left in the capstan and struck into
27 the capstan; that a year or two before that he saw them moving other buildings; that it was a building that he did not

know the name of that was moved from the town of Holly up the north road; that he passed it fifteen or twenty times while they were moving it by the light and dark together; that he has known of their moving other buildings, but never had taken particular notice of them; that he never saw it lighted; when he had seen capstan it was always left where night overtook them.

Cross-examination:

That he saw the Donaldson building about a block beyond Starker's; that he had seen it twice, once in front of Cook's house and once ten or fifteen rods further north; that they had moved it a little further up by the garden when he saw it the second time, ten or fifteen rods further; that he went by it one rainy night; that when he went by he saw the capstan there, and on his return ran into it; the capstan was staked down; have been in Holly for the past fifteen or twenty years three or four times a week; during that time John, Charles, and William Quick have moved all the buildings I have known moved.

A. B. WATSON, sworn in behalf of plaintiffs, testified that he is a carpenter and joiner by trade and lives in the village of Holly; knew of the Quicks moving buildings there in the summer of 1886; knew of one in particular that they moved from Cook's mill; that the Quicks raised the building on Saturday; the building stood back from the walk a little; that they hitched onto it and drew it up to the walk and left it there over Sunday; that Sunday afternoon he sat in the front door of his house and saw a man driving from the south with a horse and buggy; that the horse first
28 struck the chain and kicked himself free from the buggy and broke one of the thills; the chain was hitched from the capstan to the building right across Broad street; that he knew of their moving other buildings, but never took particular notice and would not have noticed this if it had not been for that accident; have no recollection of ever seeing a light on the capstan at all; did not see a light or guard around either the capstan or the building during the Sunday testified about.

Cross-examination:

That it was the Bansett building that he saw on Sunday; that the chain was hitched to each corner of the building and across the street; that the chain was lying on the ground; that the accident happened in the daytime; when the horse went over the first chain he jumped; when he struck the next chain he commenced kicking.

JOHN FORD, sworn in behalf of plaintiff, testified that he resides in Holly and is a farmer and was street commissioner in 1886; that he knew of the moving of the Reynolds building at that time.

Q. Did you take any steps to have a light or guard put around it?

A. No, sir.

The question was objected to as incompetent and immaterial.

The COURT: I think it is proper.

Cross-examination:

That he had been street commissioner a year or two before
29 that; that his duties were to repair the streets and keep the sidewalks in repair; that he did not have to perform any of the duties of the marshal; that there was no ordinance in regard to moving buildings that would occupy streets that he knew of; that he had never been called upon to move any obstructions out of the streets in the shape of buildings or capstans of any kind; that he saw them when they raised the Reynolds building; that he don't think he saw it after it started, but he knew where it was going; that he did not see it at any time when it was in the street; that he did not see the capstan in the street when the building was being moved, but he don't remember where he was at that time, was away threshing; that he was not informed on the afternoon of that day that the building was being moved that they were going to leave it there that night; that no one came to where he was threshing to tell him that; that he did not learn of it in any other way.

MARTIN AGER, sworn in behalf of plaintiff, testified that he lives a mile and a half out of the village of Holly and formerly lived in the village; that he remembers the moving of the Donaldson building that was moved up Saginaw street; that he saw it by Mr. Straker's once and by Mr. Cook's once in the evening; that he should think that the capstan was three or four rods from the building; that the capstan was staked down generally; that the chain laid between the capstan and the building; that he did not see any light or guard on either at those times. I could not tell how long this was before I saw the Reynolds building being moved; it was the same fall; that he saw the Reynolds building moved
on Maple street over to Saginaw street; that he saw it on
30 the Monday night before the doctor was injured while it stood on the corner of Saginaw and Oakland streets; that he went by it twice that evening; that the building might have been ten or fifteen feet from the corner of Oakland and Saginaw streets and was pretty — to the center of the street; that the capstan was to the north of the cross-walk and a very little to the west side of the center of the street; that he saw it going down about half past seven or eight o'clock, and that he saw it when he was going home about half past nine; that he saw no light or guard on any of them; that on Monday night the capstan was across the sid-walk and might have been three or four rods from the barn; that as he was going down he assisted a couple of ladies in getting by it; their horse acted up; that he finally backed up their carriage and told them that they had better go around on the other street. I told them to go back up by Starker's.

Cross-examination:

That he thinks that those were the only two buildings he ever saw moved there; that he saw the building at Cook's between seven and eight and perhaps half past ten; that the capstan was three or four rods from the building, pretty near the center of the street; that he could not tell how wide the Donaldson building was; that it did not occupy the whole of the street; that it left a little room for them to pass by; that when he saw the Reynolds building at the corner — Oakland and Saginaw streets he thinks the capstan was three or four rods from it and the buildings was close to the cross-walk and the capstan was a little bit west; that on the east side of the building and capstan there was room for them to go; that there was room enough for a horse that was not afraid of it.

31 LEVI C. BRISTOL, sworn in behalf of plaintiff, testified that he resides in Holly and has given some attention to the study of electricity; has made electricity special study for the last five years; that within two or three days after the accident he made experiments with the battery to see if there was any paralysis of the left limb. He applied it in the evening of the injury and each day thereafter for three days; that he succeeded in making no impression upon the nerves or the muscles with the full power of the battery. It was more than an ordinary man could stand. In a well man it would have contracted his muscles.

WILLIAM GREEN, sworn in behalf of plaintiff, testified that he lives in the village of Holly; lived there for several years in the business of handling and delivering ice; have known of Charles, William, and Jack Quick moving buildings for some years there; that he can remember as long as twelve years, and maybe longer; that he don't remember of any other persons moving buildings in Holly; that he saw the Bansett building as it was being moved from Broad street up Sherman street, toward the vinegar works; that he commences peddling ice at half past six and continues during the forenoon; that he never saw any light or guard upon the building as they were moving it; that he had seen the capstan five or six rods from the Bansett building at one time on Sherman street, near the F. & P. M. crossing; that he had passed by pretty much every building that had been moved, including the Reynolds building; that he did not remember of noticing the capstan when the Reynolds building was being moved, except over Sunday, when it lay on Maple street, next to the walk; that he saw the Bansett building when it was down near Waldo's, a week
32 or two during harvest; that he had never seen anything in regard to guarding it on any of these occasions unless they took out the sweep; that he should judge that they generally left the capstan at the place where they quit using it.

Cross-examination:

That the capstan that they were putting down was eight or ten rods from the railroad track; that it was between nine and ten

o'clock in the forenoon when they staked it down in the street; that the next day he came along and the house and the capstan were in the same place; that when he saw the Reynolds building it was in the alley just before it reached Maple street; that the capstan was against the sidewalk on the opposite side of the street.

JAMES M. ANDREWS, sworn in behalf of plaintiff, testified that he is a farmer and lives two and one-half miles north of the village of Holly, and during the last few years had been a frequent visitor at the village of Holly; knew of buildings being moved there by the Quick brothers, John, William, and Charles; that he don't recollect of anybody else moving buildings there for the last fifteen or twenty years; that he remembers of the moving of the Kelly-Quick building, a building that William Quick bought there in the fall of 1884; that he saw it in the for-part of the day and along about night—sundown—and after they had quit work, and his recollection was that the capstan was near the center of the road; that he should think the capstan was from four to six rods from the building; that there was no light or guard of any kind on either the capstan or the building; that he don't know it was necessary, as it was not quite dark yet; that he knows of their moving the Donaldson house and the Reynolds building; that he never saw any light or protec-
33 tion upon them; that they left the capstan wherever they set it; that whenever they got through their work they didn't pull it up and set it back; not that he ever knew of.

Cross-examination:

That he don't think he saw the Kelly-Quick building in the village at all; that he saw it by Evans lake and not by the settled part of the village, but within the corporate limits; that he saw it just at night, just as he was going home; that he generally went home before dark; that he did not see any lights when he went home; that he was not there in the night to see; that he did not see the Donaldson building in the night; that he don't remember seeing the Donaldson or Reynolds building after dark at any time.

Redirect examination:

That he saw it after they quit work; that the night the doctor was injured he saw the Reynolds building on Oakland street opposite the new mill; that there was a chain from the building to the capstan; that it was not far from sundown, and that there was no one working around the building or capstan, so far as he could see; the building was from four to six rods from the capstan.

Recross-examination:

That he don't believe that it was raining that afternoon; he thinks that it had not rained that afternoon; that he fixes the fact that the doctor was hurt the same night that that was the report right away; that he don't say the doctor was mistaken when he said it was storming that afternoon and evening; that he don't rec-

ollect whether it was or not, but he don't think that it stormed that afternoon and evening; that he drove up there to take Dr. Johnson home, and that it was not far from sundown; that he drove right up there and back.

34 JOHN COLEMAN, sworn in behalf of plaintiff, testified that he resides in Holly and is working on the railroad and knows the Quick brothers; that he worked for them in the year 1881 and helped them move the building known as the Church building; that they moved that building from the corner of Saginaw and Martha streets, across the D. & M. track, to another street; that he helped William Quick at that time; that he was positive that they were two days moving it; thinks they were more; that he knows of no lights or guards being put on the building by the Quick boys, nor did anybody that was working for them, as far as he knows; that they left the capstan where they happened to get through with it; that at the close of the day's work, if they were two or three rods away from the building, they did not unstake it and move it toward the building; that they moved it the other way; that he knows of their moving the Donaldson building in 1886; that he saw it one night on Saginaw street, and the capstan was three or four rods from the building; that he don't remember whether it was staked down; that he did not notice the chain; that he did not see any light on the building or capstan; that he saw it about seven, when he was going down town, and again when he went home, pretty near nine o'clock; that it was dark; that he does not know of their moving any other building there; that any time when they were moving the Church or Donaldson buildings he saw no light or guard on either of them.

Cross-examination:

That the only building he worked on in the village was the Church building, which was moved a little more than twenty rods; that it was in the street two nights, one night after he got it off the foundation; that the capstan was left after he got it off the
35 foundation; that the capstan was left up toward the railroad track that night on the north side and three or four rods from the building; this building was a large building and occupied a good share of the street; that a team could drive on the east side of it; that they worked it over to the west side of the street, so that the east side was unoccupied and the capstan was between the railroad and the building, leaving the east side of the street for persons to drive; that the building was across the railroad the next night; that the capstan was on the other street, right beside the street right next to the sidewalk; that he saw the Donaldson building one night in front of Starker's; that the capstan was three or four rods from the building; was nearer the east side of the street, so they could drive on the west side.

AARON A. HITCHCOCK, sworn on behalf of plaintiff, testified that he lives a mile north of the village of Holly and is a wagon-maker

by trade; that the Quick brothers, William, John, and Charles, have moved buildings there for the past ten or twenty years; that he knows of their moving the Donaldson house building in the fall of 1886; that they moved it from Broad street up Saginaw street; that his impression is that the building stood there in one place two nights, but was not certain, but knows that it stood there one night; that he drove down just before dark and the building stood there; thinks that they had just quit work; it must have been just about eight o'clock in the evening. When he went back he passed the building on the west side and turned in; did not think anything about the capstan, and his horse walked up to it and stopped; thinks the capstan was three or four rods from the building; that he
36 should think the capstan was near the center of the road; that he had seen buildings moved there for the past twenty years; that he should judge that they left the capstan about where they left off work from what he had seen; that he never saw any light or guard on it; that he never saw any protection of any kind.

Question by Mr. BAKER: The only building you remember distinctly about was the Donaldson building?

A. That was the only building my attention was called to.

Q. You don't stay down town evenings?

A. I don't make a practice of it; still I have stayed down there sometimes.

That Saginaw street is the principal street in the village; the next principal street is hard to tell; some think Broad and some think Maple; that Martha street is next; that he should think that Oakland street was travelled as much; thinks it is third street in regard to travel; that there is more travel on Maple street than on Oakland; that he don't know but there is more travel on Broad and Saginaw than on Maple.

LUKE MCDONALD, sworn in behalf of plaintiff, testified that he resides in the village of Holly and his business is gardening-work; that he knows of the Quick boys moving buildings there; that the Reynolds building was the width of it west of the new mill on the night of the injury, and the capstan was about two hundred feet west of it and connected with it with a chain, and was very near the center of the road; that he has worked with the Quick brothers six or seven years moving buildings; that he helped them move the Jenkins building and a building for William Quick, and that was
37 all in the village; that he helped them out in the country; at that time William Quick and John Quick worked together; that he could not tell exactly how long ago it was when they moved the Jenkins and Van Every buildings, but it was about twelve or thirteen years ago when they moved the Van Every building; that he has seen them moving buildings more or less since that time; that when he worked for them they left the capstan wherever it was brought, and would leave it there before dark at quitting time; that it was not their practice to put anything on the capstan to prevent people from running into it.

Cross-examination:

One of the buildings that he helped move twelve or thirteen years ago came off from Broad street; they were two days moving it and it stopped one night on Saginaw street; the capstan was right up to the building; we drawed it up to the building; that was the Van Every building; the Jenkins building was moved kitty-cross the street; the capstan was staked on the opposite side of the street; that he can't say the capstan was in the center of the street.

Redirect examination:

That he saw the Donaldson building on the street up by Mr. Cook's; that the capstan was near the center of the road and about one hundred and fifty feet from the building; that the chain was strung from the capstan to the building; that the capstan was very near the center of the road; that the building was drawed off to one side to let the teams go by; that he saw the building in the evening, and that there was no light or guard on the building or capstan.

Recross-examination:

That Dr. Hunter came to my house the night he was hurt and remained a few minutes; that he prescribed for his wife and pulled a tooth; that he saw the Donaldson building, at the corner of Maple and Saginaw streets; that the capstan could not have been
38 more than fifty feet from the building before dark; they had quit work; that when they were moving the Van Every building ten or twelve years ago the building was left so that teams could go by, but the capstan was staked right down in the middle of Saginaw street, about forty or fifty feet from the building; that Saginaw street at that time was not the principal street in the village of Holly; Broad street was about as good as Saginaw street then; it was the main street that was travelled north and south; that the Donaldson building was left at the corner of Maple and Saginaw streets over Sunday too, and the capstan was left some three or four rods from the building at that time.

LEVI LAPP, sworn in behalf of plaintiff, testified that he resides in the village of Holly: that he is slightly acquainted with the Quicks, knows of their moving buildings there; that he saw the Reynolds building the Monday night before the doctor was injured on Saginaw street; that the building was pretty near even with the corner; that capstan was four or five rods from the building, north, across the walk; the chain was running from the capstan to the building; that he saw it there about ten o'clock at night; that he did not see any light or guard on either; the capstan was on the east side of the street, eight or ten feet from the walk; that he saw the Bansett building being moved on Broad street across from his house; that he saw the capstan there Sunday and Saturday nights; it was four or five rods from the buildings; it was just across the street from the corner of his house; that he did not see any light or guard on the capstan or building at that time; that he saw the build-

ing in front of Charlie Bansett's, on Sherman street; that he saw it on Broad street when they commenced to move it; that the
39 chain was across the road; that the capstan was across the street opposite the building; that he saw a funeral procession pass Sunday afternoon from the south, and all rigs passed over the chains but the last one; thought they had a colt. They tried hard to get it across. After awhile it went across, but it kicked and jumped around and broke the thills of the buggy. There were probably six or seven rigs in the procession that passed over before the colt; that later in the afternoon he assisted some ladies across that chain. Their horse was afraid of the chain lying on the ground and did not like to step over it; that he has seen them move other buildings, but does not remember exactly what buildings; that he never noticed any light or guard on them; that the capstan of the Bansett building was across the street from the building next to the sidewalk, ready to move the building out into the street, when he saw it.

JACOB SCHNEIDER, sworn in behalf of plaintiff, testified that he resides two miles out of Holly, and that his business is farming, and that he knows the Quick boys; that he helped them move the Reynolds building and the Donaldson building and the Bansett building in 1886; that the night before Dr. Hunter was injured they left the building a little north of Chase's blacksmith shop; that the capstan was about three rods north of it, across the sidewalk, on Oakland street; that they left the chain attached to the capstan and the building; that they left the building that Monday night about four o'clock; that he took no precaution to protect the building—from running into it; that he took no precaution at any time while they were moving the Reynolds building; that he was then working for William Quick; that they left the building
40 on Tuesday night in front of the Holly flouring mill; that the capstan was up Oakland street about two hundred and eighty feet west of the building; that they quit work about one o'clock on account of a storm, a storm of rain and sleet; that they left the capstan staked down with the chain attached to it; that the chain was about two hundred and eighty or three hundred feet long and was strung out nearly the whole length of it; that they drawed up twenty feet so that teams could go around in going to the mill; that the capstan was pretty much in the center of Oakland street; that he helped William Quick move the Donaldson building before the moving of the Reynolds building; that they were about four days moving it; that they left the capstan wherever night overtook them—sometimes quite a piece off and sometimes not so far; that he knows of no time when the capstan was left up to the building when they were moving the Donaldson building; that there were no lights at any time upon or around either of them; that they moved the Donaldson building from Broad street, near the D. & M. railroad, down Broad street until it came to the next street, Church street or Sherman street, near Mr. Andrews' tavern, then turned and went west up to Saginaw street,

and then up Saginaw street to just below Mr. Cook's; that while they were moving this building, he did not put any lights or protection around it; that the Bansett building stood just one block south of the Donaldson building, on Broad street; that they moved it around the Andrews hotel and then went east of that; that they were two weeks moving that; that during a portion of that time it was in the street near Mr. Waldo's; that he took no precaution while that building was being moved to put a light or guard on it to prevent people from running into it; that he does not know of their taking any precaution by way of lighting or
41 any other way to prevent people from running into it at any time during the years they had been moving buildings there; that he has known of their moving buildings there about three years; that on Monday night the capstan stood probably a couple of rods and maybe three rods from the Reynolds building, on Saginaw street.

Cross-examination:

That the Bansett building was the first he helped move; that the first day they started it until it struck the edge of the sidewalk; that the building was not in the street and the capstan was across the street over against the sidewalk and the chain was lying across the street; that some horses would be a little frightened with the chain on the ground and some would not; that a good many horses would have to be led across; that the capstan was between the driv-way and the sidewalk where the gutter would probably be; that the next day they took it down near the Andrews hotel on the corner; that night the capstan was left ahead of it, about two rods south of it, pretty much in the center of the street; that the next day it was drawn up to Squire Waldo's and left a little to the side of the street; that the capstan was pulled close up to the building and left there about two or three weeks; that some real dark night some horses might get frightened at it at that place, ordinarily they would see the building if it wasn't too dark; that Mr. Quick spoke to Mr. Waldo in regard to leaving it there; that he could if he did not leave it there too long; that when they went to work again they took it down as far as the flouring mill, where it remained one night; that the capstan was just across the railroad in the street, four to six rods from the building. The next night it was pretty near the filed and the capstan stood just at the edge of the highway; that the next building that he helped move was the Donaldson
42 building; that the first day they just started it a little bit, the next day got nearly to Andrews' hotel, and then went west down to Saginaw street; that the building stood one night on Broad street; that the capstan was standing from four to six rods from it in the street; that the next stop was on Saginaw street; that the capstan was near the school-house just in the edge of the street; that the next stop was near the D. & M. R. R., south of it; that the capstan was on the north side of the railroad track, about four rods from the building; the next they stopped right in front of Church's

drug store; from there they went up to Starker's, and from there went to the final place after staying in front of Starker's one night; that the Reynolds building started in the alley back of Saginaw street; that the first day it was moved to the entrance of the alley in Maple street; that the capstan was over opposite or next to the sidewalk on the opposite side of the street; that it was not where anybody could run into it; that the next night the building was pretty near, but not quite, to the entrance of Oakland street; that the capstan was on the north side of the cross-walk nearly in the centre of the street and remained there that night, and that the next night it was where the doctor got hurt.

DELOS R. BURNHAM, sworn in behalf of plaintiff, testified that he resides in the city of Detroit and formerly lived in Holly; that he lived in the village from 1872 to 1887; remembers the occasion of Dr. Hunter's getting hurt in November, 1886; that he remembers of being on Oakland street that evening about eight o'clock; that he was driving a pair of horses and a buggy; that there was a building in the street, also a capstan used in moving the
43 building; that he drove against the capstan about six o'clock in the evening; that his horses ran against it; that he don't know whether the capstan was staked down or not; that there was no light or guard on the capstan or building at this time; that the capstan was right in the travelled pathway; that he had seen other buildings being moved there, and don't remember of any one else moving buildings there except the Quicks—William, John, and Charles; that he don't think he ever saw any light on the capstan or building or any protection of any kind at any other times when he had known of their moving buildings; that he was deputy sheriff and had to be around a good deal.

Cross-examination:

That the night he ran into the capstan was the same night he was informed that Dr. Hunter was injured; that he was deputy sheriff at Holly ten or eleven years and was marshal of the village for two or three years; that during the time he had held this position he had not heard of anybody driving into a capstan or being hurt by one; he remembers of seeing the Donaldson building with the capstan in the street one night near Chase's blacksmith shop.

FRANK HILLMAN, sworn in behalf of plaintiff, testified that he resided in Holly and during the summer of 1886 had an occasion to drive home from the country and passed one of the buildings being moved in the village between the middle of July and the middle of August; that he came from the west up Sherman street; that it was just after dark in the evening, about eight o'clock; that he saw an object in the road between three and four rods from the building and could not say it was a capstan; that there were no lights
44 or guard on the object or the building; that from the appearance would say it was a capstan; did not see anything up against the building that looked like a capstan at that time;

that when he saw the building it was east of the railroad that crossed Sherman street going to the mill; saw the Reynolds building, at the junction of Maple and Saginaw streets; thinks it was on Saturday night; that the next morning after he passed by the Bansett building, on Sherman street, he saw the capstan three or four rods east of the building, and that was before anybody had gone to work; that when he saw the Reynolds barn, at the junction of Maple and Saginaw streets, he did not see the capstan; that it was dark between seven and eight o'clock; that he did not see any capstan up next to the building or any lights or guards upon the building; that he has known of the Quick boys moving other buildings there in years past; that he don't know of any instances where a light or guard or protection upon either the building or capstan whenever they had been moving buildings there and left them over night.

Cross-examination:

That the only time he saw the Reynolds building was on the corner of Saginaw and Maple street, about seven or eight o'clock Saturday night; that the first time he saw the Bansett building it was at the junction of Broad and Sherman streets, and the next time near the railroad track; that the building was on the east side of the track; that the capstan was three or four rods from the building, about the center of the road, in the morning; that those were the only two instances he remembers of seeing the capstan in that condition.

45 THOMAS SMITH, a witness sworn in behalf of plaintiff, testified that he resides in the township of Holly, about one mile north of the village of Holly; that he has lived there about 34 years; that he is a farmer by occupation; that in the fall of 1886 he came into the village over Saginaw street from the north, between five and six o'clock in the afternoon; that he remembers of hearing of the injury to the plaintiff a few days after; that he saw a capstan on Saginaw street about six or eight feet north of the walk on the north side of Oakland street. The building that was being moved was on Saginaw street, near Chase's blacksmith shop. The capstan was six or eight rods from the building. When he went in town there were some men around the building, but he don't think they were working; that he drove on the east side of the capstan, then turned and went up Oakland street and turned south on East street, going between the capstan and the building; that he thinks he drove over a chain; that he started home probably half an hour after he reached town; that it was very dark. The capstan stood just where it did when he went to town; that he thinks that it was staked down in the street; that he did not see any lights or guards around the capstan and don't think there were any. When he went home he went right up Saginaw street, passing along on the east side of the building; the building was the Reynolds barn; that he turned up Oakland street and went to town in that way, because at that time there were several wagons and teams between the black-

smith shop and the building, and he felt a little timorous about getting around.

46 THEODORE A. MCGRAW, sworn for plaintiff, testified as follows: I live in the city of Detroit; am a practising physician and have been since 1863; know the plaintiff; visited him in Holly in 1887, at his own home. I found him in bed partially paralyzed, showing symptoms of brain trouble. His left arm was completely paralyzed, his left leg partially, the pupils of his eyes were uneven, and his pulse was about fifty a minute. I attribute this to trouble on the right side of the brain. He gave me a history of his injury in November previous, and from the examination I made of him I look upon these troubles as resulting from those injuries. I examined his urine several times. I don't recollect how many. The last time was this morning. I saw him pass it. I found it full of albumen. It indicates what we call albumenoid urea, and in this case, judging from previous examinations, I should say it indicated Bright's disease. I don't think he will ever recover from it. At the time I saw him at his home in 1887 I advised him to stop practising. I thought the jar of riding would affect him very uncomfortably. I examined his spine, and there was a spot about the sixth vertebræ which was injured, and the vertebræ was very tender and the spine had also been injured. The condition of his eyes arose from the trouble in the brain, and I attribute the whole trouble to the injury he received in November.

Cross-examination:

I never saw Dr. Hunter before his injury. The first urine I examined was sent in by express, and I found by the examination that he had Bright's disease at that time. I found albumen and casts in it. The albumen is not an unerring symptom, but when we find casts in the urine it usually indicates Bright's disease. I could not tell from these examinations whether he had Bright's disease before he was hurt or not. I have made at least three
47 examinations. The examination I made this morning I found more albumen than on any other occasion, but I did not discover casts. Casts do not appear in every passage when a man has Bright's disease. Bright's disease sometimes lasts ten, fifteen, or twenty years. I certainly think that Dr. Hunter is now sick from Bright's disease. I reach this conclusion from my examination and my knowledge of those cases. A man with that condition of urine is always in feeble health. There was so much albumen that when we cooked the urine it became solid, so that at first we could not turn it out of the test tube. Casts do not necessarily increase in quantity as the disease progresses. They very often diminish; very often in acute cases the casts are more frequent. Plaintiff's disease is not in an acute stage at the present time. He may, if he takes care of himself, avoiding hard work and exposure, live ten, fifteen, possibly twenty years. Still there may be immediate danger. We cannot prognosticate the time of death; it depends on how a man takes care of himself. There

are various causes of Bright's disease. It comes from an injury to the nervous system. If a man had Bright's disease an injury would make it more acute and bring it out. Anything that weakens the system would give the disease a greater opportunity to develop itself. An injury to the brain or spine will not infrequently cause Bright's disease. I have had a great many cases where Bright's disease came directly from the injury, where a perfectly healthy man would get injured on the brain and have afterwards trouble on the kidneys—Bright's disease. I could not say without knowing the man's condition before, simply because he was injured and had Bright's disease, that the injury caused that disease. I never examined this patient before his injury.

48 Redirect examination:

At the time of his first examination I found the patient's mind dazed; he was not in the full possession of his faculties. I was there at that time two or three hours. I thought that condition the result of his injuries.

Recross-examination:

I reached this conclusion from my examination and from what he told me. At that time I had made no examination of his urine. That was some time in February, 1887. If I were called to a man in his condition I would first ask questions about injuries; then, if I found no history of injury, I would look for other causes of brain trouble. His condition I would describe as a stupid, half-dazed condition which would result from a compression of the brain, not enough to destroy consciousness, but enough to retard intellectual activity. The symptoms he had at that time could not have been assumed. There are no drugs that a man could take that would make that combination of symptoms that I found in Dr. Hunter when I first examined him.

WILLIAM H. HALL, sworn for plaintiff, testified: I live in the village of Holly and have for about twenty years. I know Charles, John, and William Quick. Part of their business for the last fifteen or twenty years has been moving buildings. They have done the principal part of the moving of buildings in the village of Holly for about twenty years. I saw the building in question November 23d on Oakland street. Oakland was one of the most important streets of the village at that time. On that evening I had been away and got back into the village between five and six o'clock. I
49 drove down Oakland street from the west. When I got near East street I — a building there and a capstan in the road quite a little west of the building. The capstan was about in the center of the road. I did not stop to take particular notice. I did not see any guards or lights or anything around it. It was a very stormy, blowy, rough night. It was snowing and blowing very hard, and a sort of sleet. It was getting dark when I got along there. I know of their moving buildings previous to this. I have

seen their capstan on the road in front of other buildings quite a number of times. It was left, I should judge, as it was left there; it was left unguarded and away from the building. I have never seen any guards or any protection around the building, and I don't know as I ever saw a light on the building; I don't think I ever did.

Cross-examination:

By occupation I am a veterinary surgeon. I should judge the capstan was about two rods from the building; I am not positive. I don't know where the capstan was left Monday night, Saturday night, or Sunday night. I saw it on Tuesday night. I could not say *now* long before this accident a building had been moved in that village. I think there was one in 1881. I think Mr. Norris had one moved in 1886, a month or a week or ten days before the doctor's injury. This was the Donaldson building. It was moved up on Saginaw street and out beyond Cook's. Quick moved it, I think. I saw the building. I saw him at work at it once or twice, I think; had no occasion to see where the capstan was left. I don't know as I remember seeing it after working hours; I passed quite a number of times in the daytime. I don't remember seeing the capstan at night at any time while they were moving the Donaldson building. I also remember a building prior to that moved on Broad street over toward the vinegar works. I passed that one
50 night, and the capstan sat in front of it. It might have been six, eight, or ten feet away. I have never been to any except these two in the night that I really remember.

And thereupon the defendant, to maintain said issue on its part, introduced the following testimony:

MARTIN F. CHASE, sworn in behalf of defendant, testified that he has lived in the village of Holly sixteen years, and is a blacksmith by occupation; that his shop is south of Oakland, on Saginaw street, and has been since he has been there; that he remembers the moving of the Reynolds building; that he first saw the building back of Mr. Joslin's store Sunday morning; that the building stood in the alley-way south of the sidewalk; that the next time he saw it it was on the corner of Saginaw and Maple streets; that he saw it Monday night; that it had been brought down to the corner of Saginaw and Oakland streets; that it was a little east of the center of the street; that when he saw it the capstan was drawn back to the northwest corner of the building; that the capstan was up next to the building when he saw it; that it was somewhere six o'clock when he saw it; that before he saw it Mr. Quick came into his shop and asked him for a sledge-hammer to loosen some stakes with; that he was waiting for the return of the hammer to close the shop; that he waited for him to fetch it in; that he lives one block north and one block west of where the building stood; that he passes by that point as he goes to and from his shop; that
51 he saw the capstan the next morning in the same position before they came down to their work; that the next time he saw

the capstan was on Tuesday night—the night the doctor was injured; that he thinks that it was after six o'clock; that as he was going home that night he met Mr. Lobdell, who told him the capstan was left in the street, and that somebody had run into it, and that there had better be a light put on it; that he went up to where the capstan was first to see where it was located, and then went home, filled his lantern, and hung it on the building, where it was left until seven o'clock the next morning; that he remembers of seeing the Donaldson building being moved; that he seen it once or twice that he took notice of, once at the corner of Maple and Saginaw streets; that *had* had worked until they had drawn the building up to the capstan; that he noticed it again on Saginaw street not far from Mr. Starker's, and the capstan stood, perhaps, a little ways farther at that time; that he was a member of the council of the village in 1886; that he had not been informed at that time that the Quicks were in the habit of leaving the capstan in the manner complained of; that he had heard of no such thing before that; that there had been no complaints made to him whatever.

Cross-examination:

That there were six councilmen; that on his way home Monday night he went down Saginaw street, turned the corner by the building, and went west on Oakland street two blocks; that he crossed the street on the cross-walk close to the building; that the building stood on the street just ready to turn the corner; that the capstan was at the northwest corner of the building, drawn up close; that when he went out to hang his lantern on the capstan he remembers of stirking his foot on the capstan when finding it, because it
52 was very dark; that the capstan was ninety-five paces or 285 feet from the building; that he paced it off subsequently; that he was a witness on two former trials of this case in this court, and don't know as he testified before about Quick's coming to his shop after the sledge-hammer.

Redirect examination:

That on Tuesday afternoon it was sleety and rainy like, and windy and growing cold; that the storm continued all the afternoon; that it was storming when he put the lantern on it; that he did no- know who was injured; that Dr. Hunter drove a good horse, a good roadster; that Dr. Hunter always drove a pretty good jog.

CHARLES E. RIFENBERG, sworn in behalf of the defendant, testified that he has resided in Holly for the past twelve years; that he works for Mr. Chase and worked for him in 1886; that he remembers the moving of the Reynolds building and saw it in the alley back of Mr. Joslin's store on Sunday; that the capstan was on the opposite side of the street; that he saw in on Monday on the corner of Saginaw and Oakland streets; that they had drawn it down Saginaw street and turned it around, facing Oakland street, to go up

Oakland street; that the capstan was drawn up close to the building; that he passed by the building that evening and returned the next morning by the building, and it was in the same condition when he saw it in the evening before; that he and Mr. Chase went home together that evening; that he saw it the next day when he went home to dinner on Oakland street, opposite the new mill, and that he saw it Tuesday night when he and Mr. Chase went home that night. On Tuesday he saw a light on it after supper,
53 also the next morning when he went to the shop; that he remembers of the Quick Brothers borrowing the sledge-hammer at the shop; that he saw the building when they had quit work that night.

Cross-examination:

That he was a witness on a former trial of this case; that he don't remember whether he was asked about borrowing the sledge-hammer or not; that he did not have a talk with Mr. Collier before he went on the witness stand; that he never talked with Mr. Collier.

WILLIAM G. EVANS, sworn in behalf of defendant, testified that he resided in Holly; that his shop was situated on the corner of Sherman and Broad streets, right opposite the Andrews hotel; that he remembers the moving of the Bansett building and Donaldson building; that the Donaldson building stood on the south side of the D. & M. track, on the west side of Broad street; that they moved it south of Broad street to the first street that runs west to the Baptist church, to Saginaw street, and there it stood over night; that when he went uptown, along about eight o'clock, that he saw a light over there on the building or capstan; that it was high; that he saw it as he passed along Broad street; that he recollects the moving of the Bansett building; that it was moved on Broad street, down Broad street to Sherman street, and then up Sherman street; that the first night after they got onto Broad street it stood on the corner of Sherman and Broad streets, near his shop; that the capstan was on Broad street, a little south of his shop; they had drawn the building down to Sherman street, so that they could turn up Sherman street; that the capstan was on the east side of Broad
54 street, on the travelled part; that there was a light on the capstan that night; that he saw it from his shop; that he afterward saw the building and capstan when they got it up in front of Squire Waldo's.

Cross-examination:

That he is now one of the councilmen of the village and was elected last spring; that he saw the Andrews building being moved before the moving of the two buildings heretofore mentioned; that he could not tell who put the light on the capstan the night it stood by his shop; that it was between eight and nine o'clock when he saw it; that he saw it only once that evening, because he shut up his shop when he went home; that the Donaldson building

stood on Saginaw street a little north of the Baptist church whe- he saw a light on it; that he cannot say whether the light he saw was on the buildings or capstan; that he knows that there was a light over there; that when he got on the corner of Church street he could see the light; that there are no buildings on the north side of Church street to obstruct the view; that he could see right down Church street.

Mr. BAKER:

Q. How long have you been a member of the council?
A. Since last spring.
Q. Prior to your being elected a member of the council had you learned in any way that the Quick Brothers were in the habit of leaving unguarded and exposed capstans in the street?

Objected to. Objection sustained. Exception for defendant.

That he was a citizen in 1886 and a tax-payer.
Q. Prior to the accident of Dr. Hunter, as a citizen of that village, had you any reason to believe that the Quick Brothers when
55 they moved buildings would leave their capstan in an exposed and dangerous position?
A. I had not.

HENRY C. JOHNSON, sworn in behalf of defendant, testified that he lived in the village of Holly for about fourteen years; that he lives on the corner of Church and Le Grand streets, about one block west of Saginaw street; that he remembers of seeing the Donaldson building when it was first taken off its foundations; that they moved it down Broad street to Church street, down Church street to Saginaw street, and turned it around to Saginaw street and left it there over night; that he saw it that night; it was on the west side of Saginaw street; that he didn't see the capstan, but the building was lighted up; that he saw it again after it passed over the track, but did not pay any further notice to it; that he saw the building about nine o'clock when he was going home; that he saw the Bansett building when it was being moved off its foundation, but did not take any particular notice of it; that he saw it standing there by Mr. Evans' shop, on the corner of Broad and Sherman streets; that he saw it day and night both, but when he saw it lighted he was coming up to Disbrow's—that is, up by the mill; that was after nine o'clock; that the capstan was about four rods up Sherman street, right by Mr. Marshall's house, and the building stood on the south side by Mr. Evans' harness shop.

Cross-examination:

That the Bansett building when he saw the capstan four rods from it was on Sherman street; that he saw it in the night-time, and that there was a light right on the corner of the building that night; does not know who put it there; that there was no
56 light on the capstan; that the light was on the end of the building to the west; that he should judge it was a common

lantern; that it was a white light that he saw on the Donaldson building; that he did not see the capstan at all; that the light was on the southwest corner of the building; that it was stuck out on a kind of a prop on the end of the building; don't know who put it there; that it was in 1886 when he saw the light on the building. The building was headed north. If one was coming from the north, I don't know as he could see the light. The Quicks still live in Holly.

J. M. VAN EVERY, sworn in behalf of defendant, testified that he has lived in Holly about eighteen years; that his shop is on Broad street about three rods south of the Andrews hotel; that he remembers of the moving of the Bansett and Donaldson buildings in 1886; that the Bansett building was moved from the southeast corner of Church street; that the first day they moved it out on the walk two feet; that the capstan was across the street near the sidewalk, in the gutter. The next day they moved it down to the corner of Sherman street; that the capstan stood that night across the street near Mr. Van Every's shop, on the north side, pretty well back, a few feet back; that he remembers of seeing the Donaldson building being moved and saw it where they left it over night; that he saw it on the north side of Church street, on Saginaw street; that was across the road from Mr. Watson's, a little in front; that about eight o'clock that evening he and Mr. Evans went up the street and saw a light on the building and remembers that they talked about it.

57 Cross-examination:

That he don't know that it was an uncommon thing to see a light on a building that caused them to talk about it; that we didn't very often see it; that there had been a great many buildings moved there; that he saw a light on a capstan by Mr. Evans' shop in the night; that is another instance of a building being moved in that corner of the town where he had seen a light on the building or capstan; that he cannot give another instance; that the Quicks have been moving buildings there for the past twelve or fifteen years. I could not say that it was an uncommon thing to see a light on a building in this part of the town, and a good many have been moved there; can give other instances there by Evans' shop.

THOMAS J. VINTON, sworn in behalf of defendant, testified that he resided in Holly for twenty-three years past; that his place of business is on Broad street; that he saw the Bansett building when it was being moved; that he saw them screw it up and load it on timbers; that the first draw they drew it out eight or ten feet; the capstan stood right across the street; that on Monday they moved it down to Billy Evans' corner, Sherman street; that he don't remember of seeing a light on the Donaldson building; that he don't know as he saw this building after dark; on other buildings besides these two he has seen lights; that he has seen seventeen

buildings moved within seventy-five rods of where he has lived on Broad street.

58 WILLIAM LACY, sworn in behalf of defendant, testified that he resides in the town of Holly; that his east line is the corporation line; that he has been deputy sheriff, treasurer, and constable; that he remembers of the moving of the Donaldson building; that he saw it on Saginaw street, in front of where the Mansion house used to stand; that one end of the capstan was shoved right under the building; could not say whether it stood there over Sunday or not; that the Mansion house was on the corner of Saginaw and Maple street-.

WILLIAM H. COTHERALL, sworn for defendant, testified as follows: I reside in Holly; my business is blacksmithing and wagon-making; my shop is on Saginaw street, a little north of Maple, close by Mr. Chase's blacksmith shop. I remember the moving of the Reynolds building; saw it go by my shop; did not see it after quitting time; saw the Donaldson building go by. I did not pay any attention to how it was located, excepting one night. I think they left it on Maple street. The capstan was left on the west side of the street. The drawing tackle was on the west side of Saginaw street, and the building was a little toward the center of the street; east, toward Norris' barn. I had a building of my own moved. It was a wagon shop, moved from Maple street down to where it is now located. About nine years ago I had a building moved from the south side of the D. & M. R. R. on Saginaw street by the same parties. When they moved for me they moved it across Maple street north the first day, then they moved their machine on the west side of the street and drew it right out on the wide of the street so that there was a fair opening all the way through.

59 Cross-examination:

When they moved for me the capstan was out on the street one night in each case. One of the buildings—the shop—was moved from the southeast corner of Maple and Saginaw streets north on Saginaw street; at night they moved the capstan west and pulled the building back the other way; when they commenced work the next day they used the capstan pretty near where they left it; the other building stood at night just above Maple street, on Saginaw street; that capstan at night was on the west side of Saginaw street; it was not staked down; I could not tell as any light was on it; the night I saw the Donaldson building, that was north of Maple street, on Saginaw street; the capstan stood on the west side of it; between the sidewalk and the center of the street there is no ditch there; it stood about a rod and a half, or a little further, from the building.

GEORGE E. POMEROY, sworn in behalf of defendant, testified that he is a lumberman, and has resided in the village of Holly twenty-six or twenty-seven years; that he knows the Quick Bros.;

that he has known of a good many buildings being moved by them in the village of Holly during the past twenty-six years; that they have moved buildings for him; that he has been a member of the council five or six times; that he was not a member in 1886; had been a member of the council before that; that he had been a citizen and tax-payer during all the time; that the Quick boys have moved eight or ten buildings for him; the Bansett building was one of them; that he has seen most of the work done.

60 Q. Will you state what the fact was as to their taking care of the capstan during the night when they were moving buildings?

Q. They have always attended to it, I thought, universally.

Q. How would they do it?

A. Some of the time they would move it out of the roadway, outside of the walk, and sometimes put it back up to the buildings; never knew them to do any other way but one time and then it was moved outside of the road.

Q. Where was that?

A. Then it was moved at the Bansett building; that was the building.

That when they moved the Bansett building the capstan was moved at one side of the street at night; that he could not tell exactly how many buildings they had moved for him—from eight to ten; can think of seven now; that most all of the time he was present looking at the work every day and around every evening; that they moved all of his buildings for him; that no one ever made a complaint to him about their leaving their capstan so that people would run into it and get hurt or anything of that kind; that he remembers of Dr. Hunter's getting hurt; that up to that time he had never heard of anybody's getting hurt or anything of that kind on Quick's capstan; that he is about town nearly every day in the transaction of his business and he knows most everything that is going on; that he knows about their moving most every building in town, about their moving the Donaldson building; that he cannot describe the manner in which they left the capstan at the different places where they stopped over night, and that he don't remember all, but every time he saw it thought it was safe from being run into; that he remembers when they commenced

61 to move the Reynolds building; that he was not informed in any way prior to the accident to Dr. Hunter that they were leaving their capstan in an exposed condition in moving that building.

Cross-examination:

That when they were moving the eight or ten buildings for him he looked after it, but don't know as he ever told them to move it out, as they always did it; that he don't know as he did tell them to do it; the occasion of his looking to them was that they were his buildings and he wanted to see that it was done right; that he won't swear that he didn't tell them to take the capstan out of the street; that when they moved the Bansett building he told them

not to leave the chain across the street over Sunday; that they did not leave it across the street; it might have been at the side of the street; that he don't know but it was lying on the ground across the street.

Q. Do you think that is the way to dispose of the chain?

A. If it had been my chain I would have put it up.

That he should not wonder if on Monday night that capstan was four or five rods from the building; that he can't say where it was Monday night or Tuesday, but thinks on Monday night it was at the corner of Sherman street. It was on front of Waldo's a week or two.

JAMES H. CUMMINS, sworn in behalf of defendant, testified that he has resided in the village of Holly since 1865 and resides on Oakland street; that he first saw the building on the corner of Oakland and Saginaw streets that was being moved there at the time Dr. Hunter was hurt; that the building when he saw it was just ready to turn up the street; the front was ahead and
62 partly ready to turn up the street, pointing to Oakland street; that the capstan was right at the left corner; it had been across the cross-walk; it had been drawn right against the west side of the building; that he saw it in the evening and in the morning, as he went away early in the morning on the early train.

Cross-examination:

That he was away when they told him that the doctor was hurt; that he don't know when his attention was called to the matter; that it was talked about, but don't remember of anybody calling his attention to it; that he was away from home at the time the doctor was hurt and two or three months after that; there is no particular reason that he knows of why he remembered of seeing the building that night; that he passed it, and that it stood there when he went away; there was no light on the building or capstan, but the chain and the capstan were up close to the building; that he saw the chain and that it wasn't dark; that it was probably half past six when he went home and about six or half past six the next morning; that his recollection now is that it was not cloudy; that in his remembrance it was a starlight night.

SELAH M. BAIRD, sworn for defendant, testified that he resides in Holly and lives on Sherman street; that he remembers of the moving of the Bansett building; that he saw them when they were moving it; that his shop is on Broad street; that he goes to and from his shop on Sherman street; that he saw them when they were putting the rollers under the building; that the capstan was right across the road; that when they got the building at the corner of Broad and Sherman streets the capstan was in front of William Evans' shop, a little bit south; that he saw a light upon it;
63 that he next saw it up by Mr. Waldo's house, on the left side of Sherman street; it was left there a number of days; that the capstan was shoved back to the building and all their traps were

piled up there; that he saw it after it had left Mr. Waldo's as he passed up and down Sherman street every morning, noon, and night; that at night they moved the building just as near the capstan as they could; that he saw them move the John Andrews building; that it was in the street only one night; that there was a light upon it that night; that he saw the Donaldson house when near the Baptist church with a light upon it.

Cross-examination:

That he saw a lantern on the capstan that night, when it stood near the corner of Broad and Sherman streets, about nine o'clock; that Sherman street is four rods wide. There are no ditches. It has a sidewalk five feet four inches wide on each side. The building was eighteen or twenty feet wide. In front of Waldo's the capstan was about the length of the sweep away. The building was not on the sidewalk in front of Waldo's. That he saw the Donaldson building in the evening; that he thinks the light he saw was on the building; that the light was on the southeast corner of the building; that those two occasions are the only two occasions that he has ever seen any light on buildings while being moved; that he never saw a light upon a capstan but once.

THOMAS BOGART, sworn in behalf of defendant, testified that he resides in Holly and is engaged in the lumbering business; that the lumber yard is what is known as the Donaldson property; that he remembers the occasion of the moving of the Donaldson building by the Quick brothers; that the building was under
64 his care; that he sold it to a party who had it moved by the boys; that he saw the building in process of moving; that in the first place he objected to their moving it for the fact that he thought they would have to cross the track; that it might get us into trouble, and they concluded to move it another way—down Broad street and around on Church street and up Saginaw street, and the arrangement was to move the building and leave everything in proper shape so that it would not get them into trouble, and that he took special pains to see that things were left in shape evenings or nights; that at first they moved it off the foundation on skids; that then he made a special point to go evenings and see how it was left. It was left in shape, so that he concluded that it was safe; that the next day they moved down Broad to Church and to the corner of Saginaw street and there left it the second night; that on his way home he made it a point to look after it that night; that he found everything in proper shape sufficiently so that he could raise no objection; that he especially looked after the sidewalk that they tore up to see whether they were going to use the plank to move on; that they laid those out to one side and took them back; that the next night they left the building near Mr. Church's drug store—somewhere about that point; that he did the same thing the third night and concluded that everything was safe there—that is, as far as he followed up the building; that after they

crossed the railroad track it was practically out of danger, he thought; that there was a light on the building the night he saw the buildings at the corner of Church and Saginaw streets; that he met Mr. Johnson there that night and stopped and talked about it; that they happened to meet as he was going home down Church street, and he told him he was going there to see how things
65 were left; stood there a moment or two and talked about it and passed on, and that he saw them move the Gardner barn; that they moved it directly past his barn; that they came out of the street as they went onto Mr. Gardner's lot; that when they got ready to leave evenings they called him out and asked him if everything was left satisfactory; that they borrowed his lantern to put on the building that night; that he has seen them move several other buildings.

Cross-examination:

The Gardner building was moved four or five years ago; that it was a couple of years before the moving of the Donaldson building; that he did not take any interest in the moving of the Donaldson building when they got it across the railroad track; that the capstan set the first day on the opposite side of the street; that when he saw the building at the corner of Church and Saginaw street that there was a light on it; that there was no light on the capstan; that they had unhitched it and pulled it back and ran the legs under the north end of the building; that he never saw a light on the capstan; that he was a trustee last year and a year before.

W. W. SLOCUM, sworn in behalf of the defendant, testified that he resides in Holly and is a builder; that he lives at the east end of Sherman street; that he was a member of the village council in 1886; that he knows more or less about their moving buildings; that he has seen the Quick boys move buildings; that he remembers of seeing them move the Bansett building, but not until they got on Sherman street did he notice it; that William Quick came to him and asked him if
66 he thought it would do any hurt to leave it in front of Squire Waldo's; that he said he did not think it would, being that that street was not travelled much and if the squire was willing and if they would get it to the south side so that teams could pass; he undoubtedly told them he must put his chains and implements up to the end of the building; that he did so; at least he saw them there the next day; that perhaps he has seen them move all the buildings, but never had his attention directed particularly to them; that they have moved buildings where he has repaired buildings; that nothing ever occurred in their moving that led him to believe that they were careless in doing their work; that he saw the Bansett building on two different occasions at least; that he saw it before it crossed the mill spur; that the capstan was at the side of the building; that it was just between daylight and dark; that the next time he saw it they crossed the spur of the rail-

road and had got it about half way and seemed to have been broken down; that it was out a little one side of the track, raised on timbers; the capstan stood a little angling to the southeast; that the next time he saw it the capstan stood over in the field; that the building was not entirely out of the travelled track after they had crossed the spur, but that the capstan was to one side; that during the year 1886 prior to the accident he did not learn, either from his own observation or from anything communicated to him, in any way that the Quick Brothers were careless in taking care of their capstan.

Cross-examination:

That his observation in the country was his principal source of knowledge about them; that he don't remember of their moving buildings in the highway at all, so that he had no occasion to make any observations what their habits of negligence were in re-
67 spect to their leaving the building and capstan in front of Squire Waldo's; that he testified on the first trial of this cause as follows: "I came down the street one day to see. I thought it ought not to stand so long and asked Bill (William Quick) what business it had to be in the street. It was the first year I had served and I was a little zealous. I don't know that I would do it now. He said some of the village officers told him to do it if the esquire was willing. He said, You see I have moved it close the building." While the building and capstan stood in front of Esquire Waldo's that he noticed it all the time for fear something might happen; that after the building left Waldo's he saw the capstan out at night, staked down, he thinks; perhaps it was in the place where they had used it last; that he never saw a light or guard of any kind on the capstan or building.

CHARLES H. BARRETT, sworn in behalf of defendant, testified that he resides on Sherman street, in the village of Holly; that his house is the first house east of the spur that leads to the mill; that he remembers of seeing the building as it passed his house and the way the building and the capstan was left; that he first noticed the building in front of the house after it crossed the track; that the capstan was a hundred or a hundred and fifty feet east of the building, in the center of the road; that when he first saw it it was about five o'clock; that before they quit he went over there after his little boy; that they were then taking up the stakes and moving the capstan back to the building; that the next night, if he remembers right, the building was right in front of the flat-iron block,
68 right aside the road; that the capstan was placed at the side of the road; that the next night they got it over into the field.

Cross-examination:

That it was about five o'clock when he saw them moving it; that the building stood in front of his house that night; that about half past five they were tearing it up and moving the capstan back to

the building; that it was up against the building; that there was no light on the building or capstan; that he never saw a light on a building or capstan; that in his opinion it would take from fifteen minutes to an hour and half to stake the capstan down.

H. M. BALDWIN, sworn in behalf of the defendant, testified that he has resided in Holly for about twenty years; that he has been police there three or four years and has been night watch; that his time was out in the spring of 1886; that during the time there was one or two buildings moved there; that he never saw the capstan that he remembers of left out at all; that the council instructed him to look out after everything, to see that everything was all right, and that he tried to do; that it was three and one-half or four and one-half years that he was in, and during that time he never saw a capstan out or anything of the kind.

Cross-examination:

That he thinks that they had a night watchman after he quit; that his instructions were from the council; that they said to look after everything appertaining to the village's welfare; to carry out those duties he was out from dusk until nearly daylight; that they never particularly instructed him to look after the capstan, and that he went around over the streets; that he remembers of the
69 Quick Brothers moving only two buildings, and that he paid attention to how things were all over; that he thinks he has seen a light on a capstan two or three times; that he don't think he has seen it a great many times otherwise; that it was lighted with a lantern when he saw it; that when he was a policeman he saw the capstan with a light on it once on Saginaw street and once on Broad street; these are the only instances he noticed when he was on duty; that on the night of the plaintiff's injury he saw the capstan after the Quicks had quit work and before dark; the Quicks live out of town; that he did not put a light on it because he had enough to do and supposed they would put a light on it.

A. N. SMITH, sworn in behalf of defendant, testified that he resides in Holly and in 1886 he lived in Holly in a house known as the William Young's house, which is nearly opposite the house owned by Aaron Starker; that he remembers the Donaldson building when it stood in front of Mr. Starker's; that he saw it when he was coming home from work after six o'clock; that after supper he went down-town and came back about dark, and as he stood on the porch the milkman was at Starker's, and knowing it was his custom to drive the street from his house to Starker's pretty fast and concluded he would run into the capstan unless he was warned that he went out by the capstan and, as he started up, called to him and stopped him and he asked what the matter was; that he said, If you run into this capstan you will find out what is the matter; that he turned around it and came over to his house; that he went into the house and lighted his father's lantern and took it out and hung it on the capstan.

70 Cross-examination:

That he left the light upon the capstan about two and one-half hours; that he took it in because his mother was afraid the lantern would be stolen; ordered him to do so; that the Quicks had gone away and left the capstan in a dangerous place; that he took it off about his usual bed time, about half past nine; that the capstan was staked down about two or three rods from the building.

H. M. CHURCH, sworn in behalf of defendant, testified that he resides in Holly and has been in the drug business there over twenty years; that his building is on the corner of Battle alley and Saginaw street; that it is a brick building; that there was a wooden building there before they built the brick building; that he sold the wooden building and the party he sold it to had it moved off; that it was moved off by the Quicks; that as near as he can tell the building was moved out into the street the first day and across the track, and as they crossed the track they had to run it down angling onto a lot and just turned so as to take it out of the road; that the capstan was pulled up in front of Mrs. Spaulding's; that the building was out only one night in the street; that the capstan was possibly four or five rods from the building; that he was trustee of the village in 1886; that up to the time of the accident to Dr. Hunter his attention had not been called to any misconduct or negligence on the part of the Quicks.

Cross-examination:

That there was a light on the building or capstan; that his impression is that it was on the building; that the building
71 stood cornerwise, and that he thinks that there was a light on the corner of the building; that he was sworn in this case before, and this building was moved in 1881 or 1882; that he testified on the former trial there was no light on the capstan, and that he thought there was none on the building; still it is now his impression that there was one on the building; that his recollection when he formerly testified ought to be better than it is now; that he has seen the Quick Brothers moving buildings in Holly on many occasions; that he may have testified on the former trial that he has seen the capstan six rods from the building on the side of the street without a light on it; in that case it was out of the wagon track; there is no ditch there; if a team sheered out to one side they might have run into it; that he should think it was a dangerous positions if a team became frightened; that he has seen capstans left out many times; that he saw the Donaldson building one night in front of his store; that he cannot tell whether there was a light on it or not, and don't remember where the capstan was; the Reynolds barn was moved from the same block in which his store is located and he saw it being moved on Saginaw street before the plaintiff was injured.

JAMES W. MOTHERSILL, sworn in behalf of defendant, testified that he has resided in Holly since 1862; is in the mercantile business

and knows the Quick Brothers; that he has seen them when they have been at work at nearly all the buildings they have moved; that he never noticed the capstan but one night which he recollects; that he saw it on Saginaw street, just north of the D. G. H. & M. track; that he saw a light on it on that occasion; that it was somewhere about ten o'clock; that the building was two or three rods from the track and the capstan ahead of it, right next to the
72 walk on the west side of the road; that he was clerk of the council in 1885–'6 and 1886–'7; that his attention has not been called in any way to the habits of the Quicks moving buildings.

Cross-examination:

That this is the only time that he ever remembers of seeing the capstan at night; that the light was on the building; that he could not say whether it was fastened on the building, but was on ahead of the building; that it must have been about ten o'clock at night when he saw it; that he could not say whether the capstan was staked down or not; that he knows of Oakland street; that it has been open to public travel since before 1862; that the capstan, when he saw it, was within a foot or two from the walk, toward the center of the street; that there is quite a little depression from the center of the street to the sidewalk, and the capstan stood in the depression; that while he was clerk of the counci- he had no recollection of any action taken by the council respecting the moving of buildings or any instructions given to the night watchman; that Oakland street is not one of the principal streets of the village; that Saginaw, Maple, and Broad streets are the principal streets; that he would not think that Oakland street would come third or fourth in respect to travel; that he thinks it is fifth or sixth; that there are three or four farms tributary to Oakland street; that there are houses on both sides of the streets in the corporation; that there is a mill one block from Saginaw street that does some custom business.

L. H. RIPLEY, sworn in behalf of defendant, testified that he has resided in the village of Holly twenty-one years; that he was a member of the council in 1886; that he has known of the
73 Quicks moving buildings; they have been engaged in moving buildings there for the past ten or fifteen years; that he remembers the Bansett building specially; that one evening when he came in town about ten o'clock he found the building in the street, perhaps one-third or one-half across the street; that he passed between the capstan and the building; that he had no difficulty in passing between the capstan and the building; that he had no recollection of hearing up to the time of the accident to Dr. Hunter that the Quicks were in the habit of leaving their capstan in dangerous positions; that he never heard of anybody being injured by driving in the capstan.

Cross-examination:

That that is the only time that he noticed the capstan at night as he remembers, but might have seen it other times; that he did not see any light on the building or capstan that night; that he testified on the former trial that there were none on either; that it was a bright night and did not require it; that the building and capstan were about forty feet apart; that he has no recollection of seeing any chains.

MARTIN B. BURGESS, sworn in behalf of the defendant, testified that he has lived in the village of Holly about nine years; that he has been a member of the council; was a member in 1885 and 1886; that he knows of the Quick boys moving buildings in the village of Holly; that he has never seen the capstan out at night; that at the time Dr. Hunter received his injury in 1886 he had not in any way been informed of the way the Quicks had handled their capstan; that he had never noticed the manner in which they left their capstan; that he never noticed it in the evening; that he is a travelling salesman and it not in Holly much of the time.

74 LYMAN HERRICK, sworn in behalf of the defendant, testified that he is a farmer, but has lived in the village of Holly for seven years; that he had known the Quick boys since they were young men; that he was marshal of the village of Holly in 1886; that during that year the Quick Brothers moved buildings through the streets; that he remembers of the moving of the Reynolds barn; that his attention was first called to it in the alley back of Saginaw street; that he was standing at the corner of Joslin's store, near Maple street, and saw them move the capstan in the middle of the street; at that time a great many teams were passing, and, thinking that it was not right that they should remain there, he walked down to where they were at work and asked *him* if they were going to leave the capstan there, and they told him no; that they were not going to move the building any further that day; that they would take it over to the north side of the street and leave it by the sidewalk; that that would be out of the travelled way and would be safe there; that there is some depression of the ground there; that it was left there that night and remained there over Sunday; that he don't know how far they moved the building Monday; that he noticed them when they were moving the Donaldson building and the Bansett building; that he thinks that he was not in the village during the night that the Bansett building was near the Andrews hotel; that he never knew Kellogg or Burk by name until he saw them on the stand; that he might have had a conversation with them, but if they spoke to him as they said they did he did not hear them or did not understand them; that he had not been informed in any way at the time they commenced to move this building or prior to that time that they had been in the habit of leaving their capstan in dangerous places; that he saw the Donaldson building the day they got it into Broad street; that the
75 next time he saw it was down near the Baptist church; that

he don't know whether it was lighted or not; that he don't know as he had any reason to believe that the capstan was left in a dangerous shape; the next night it was left near Church's drug store; that he don't know what was done with the building and capstan that night; that he saw it one night when it was up near Mr. Cook's; it was in the night when he passed it, and it looked as if they had drawn the building up and left the capstan close to the building; that it was not in a dangerous place; that if they turned out they would go around the capstan all right; that he had a strange horse with him; it was dark, but he could see the building plain; that he could not see much of the road near the gutters on either side; that he got out and led his horse around it and got around without any trouble.

Cross-examination:

That Mr. Smith told him about the time of the moving of the Donaldson building that they had left the capstan in bad shape and that he had put a lantern on it; that he took it off before going to bed; that he requested him if it was a dark night to hang it on the next night; that he don't know that the next night was the night he saw it at Cook's; that he had a talk with the village president, Mr. McGonegal; that he asked Mr. McGonegal if it was his business to look after the moving of buildings, and he told him that he did not know as it was; that he had failed to find any ordinance; that he remembers of testifying on the former trial; that he went to the furnace where the village president was at work on some business, and while there asked him if he had any authority in regard to the building being moved on the street; that he said he supposed not, that they did as they had a mind to, or something like that.

76 Redirect examination:

Q. You were talking about whether you had authority or not.

A. That was what I was talking about; that he knew of no ordinance.

JAMES MCGONEGAL, sworn in behalf of the defendant, testified that he has resided in Holly about nineteen years; that he was village president in 1885 and 1886; that he knows the Quick brothers and has seen them move buildings on the street; that prior to the moving of the Reynolds building he had not learned, as president of the village, in any way that they were in the habit of leaving their capstan in dangerous places; that there was no ordinance for the village of Holly on the subject of moving buildings; that he remembers the conversation with Mr. Herrick about the Donaldson building; that he remembers that he came down and asked him something in regard to moving that building and wanted to know if it was his duty to watch them or look after them; that he told him that he knew of no ordinance making it his duty or that of the witness; that the subjects discussed was in regard to whether there was anything to govern him or witness in regard to moving the buildings; that he remembers of seeing the capstan on at different

places when they were moving buildings; that he remembers the moving of Church's old foundry on Saginaw street; that they moved it, perhaps, ten rods and it was in the street two or three days; it came near falling down; they had a hard time; that the capstan was left sometimes at the side of the street and sometimes up to the building; that there was nothing in the manner in which
77 they took care of the capstan at that time that led him to believe that they were habitually careless about it; that on that occasion he saw a light on the building; that a light would ordinarily light up the capstan and the surrounding tools.

Cross-examination:

That it was the church foundry and not the church building that he testified about seeing; that he don't recollect any other instance where he has seen a light on a capstan or building; there was not any light on the capstan that night; that he has seen the capstan very many nights varying distances from the building and has seen it close up to the building and has seen it three or four rods away; that when it was two or three rods away it would be on the side of the street between the center of the street and the sidewalk, where he considered it out of the way; that there was plenty of room to drive past and any one could easily have gotten by it; that the streets of the village are ordinary dirt roads with the center somewhat rounding; that there is very little travel there in the night-time; that there are perhaps twelve or fifteen hundred inhabitants in the village.

E. E. Brewster, sworn in behalf of defendant, testified that he has lived in Holly twenty years; that he was a member of the council in 1886; that he knows of the Quick brothers moving buildings in the violage; that he remembers of the moving of the Donaldson building. When he first noticed that building it was passing his house on Church street; that the night the building was left on the corner it was on the left side of Saginaw street, so that they could go around easily on the east side of the building; that he did
78 not notice the capstan; that the building was lighted that night; that he thinks the building was lighted on the northeast corner; that that would make it on the corner on the side where the wide space was; that the light was an ordinary lantern and was hung five or six feet high; that he thinks that he would have noticed the capstan if it had been in the center of the street or in any dangerous place; that he had not been informed prior to the accident of Dr. Hunter in any way, either as a member of the village government or as a citizen of that village, that the Quick brothers were in the habit of leaving their capstan and building in an unguarded and dangerous situation at night; that he had never heard of any accident but the Hunter accident.

Cross-examination:

That he don't know but that other people have run into the capstan and building before that time; that he saw this Donaldson

building on the corner of Church and Saginaw streets; that he don't remember about seeing the capstan; that the light was plain to be seen on the east side of the building.

ALONZO B. CORNELL, sworn in behalf of defendant, testified that he has lived in the village of Holly twenty years and knows Dr. Hunter; that he is an amateur oarsman; that Dr. Hunter is an amateur and both row shells; that Hunter could row as well as he could; that he ascertained this by racing with him; the doctor used his boat, the witness his; the doctor's boat was a shell much lighter and requiring much less strength to row it than that of witness.

79 NELSON L. GOODRICH, sworn in behalf of defendant, testified that he lived in the village of Holly and has lived there for thirty years; that he lives on the bank of a lake known as Simonson lake; that he knows Dr. Hunter; that the doctor rowed a good deal a year ago; that he was the best rower that he ever saw. The doctor had a shell; witness never saw one like it; that of Cornell, the last witness, is near- like it than any other he ever saw.

CHARLES C. WALDO, sworn in behalf of the defendant, testified that he has lived in Holly twenty-five years; that he lives on Sherman street and knows the Quick boys; that he remembers of their leaving a building in front of his place ten days or two weeks; that they left it on the south side of the street, opposite the back part of his house; that he saw the building every day while it was in front of his house; that the first night the building was left there the capstan was, perhaps, six, eight, or ten rods ahead of the building; that early the next morning the men came and took the capstan and put it up next to the house.

Defendant also introduced testimony tending to show that the disease known as Bright's disease is not likely to result from injuries such as those alleged to have been received by the plaintiff, and that the plaintiff was not so seriously injured as claimed by his witnesses.

80 Rebuttal:

MARTIN F. CHASE, recalled on behalf of the plaintiff, testified that on the night that the doctor got hurt he went and put a light on the capstan; that he put — there because a man told him that a man got hurt there and he thought it needed a light, and that was why he put — there; that after he heard that a man got hurt there he knew it was dangerous.

SELAH M. BAIRD, recalled in behalf of plaintiff, testified that the Andrews building that he testified about was moved in 1884 or 1885; that there was a light on the capstan or building, but could not tell which, but thinks it was on the capstan; that the building was almost in front of his shop on Broad street; that it was out one night and the light was on it that night; that Mr. Andrews put the

light on the building; that the Quicks were working for Mr. Andrews at that time.

The foregoing is the substance of all the testimony introduced on the trial of said cause.

81 Counsel for defendant submitted the following requests to charge:

Defendant's Request.

1. There is no evidence in this case that the village of Holly or its officers were guilty of any negligence and the plaintiff cannot recover.

2. That the fact that the capstan remained in the street from noon until the accident at about six-thirty o'clock in the evening does not show any negligence on the part of the village or its officers.

3. If the jury find that William Quick, in moving buildings over the streets of the village, had been in the practice of placing or leaving a capstan near the building or at the side of the street so that it was not a dangerous obstruction of the street, then the plaintiff cannot recover.

4. If the jury believe that William Quick in using the capstan was not in the habit of leaving the capstan in a dangerous position, but usually placed it in such a position as to be reasonably safe and only once in awhile left it in a dangerous position in the street, then the plaintiff cannot recover.

5. The village of Holly and its officers were not guilty of negligence in permitting William Quick to move this barn through the streets or in permitting him to use a capstan for the purpose of moving the barn.

6. The defendant village cannot be held liable in this case because the village council has not an ordinance regulating the use of the streets for the moving of buildings.

7. The defendant village cannot be held for the negligence of William Quick and can only be held responsible for its own negligence.

8. The village authorities were under no obligation to make its streets absolutely safe. They are only required to use
82 reasonable care or, in other words, to use such care as prudent men would under like circumstances.

9. The defendant is not liable unless the jury find that its officers omitted to do something relating to this capstan which prudent men would have done.

10. Under the statutes of the State of Michigan no action can be maintained against a village for an injury caused by a defect in or obstruction of a street or highway unless it is shown that the village has had reasonable time and opportunity after such street or highway became unsafe or unfit for travel to put the same in the proper condition of use, and has not used reasonable diligence therein.

11. There is no evidence that the mover, William Quick, fre-

quently left this capstan in a dangerous position in the streets of the village of Holly.

12. If citizens of the village of Holly placed lights on the buildings moved or on the capstan it would show that there was no negligence on the part of the village on those occasions, and the village is entitled to the full benefit thereof in considering the question whether it was guilty of any negligence in this case.

13. The declaration in this case is not based upon the Michigan statute on the subject.

14. Under the laws of Michigan, as construed by the State supreme court, the plaintiff is not entitled to recover.

15. The fact that the capstan on two or three occasions, some months or years apart, was left in an exposed and dangerous position would not of itself show that the village was negligent in this instance.

16. If the Quick brothers in the majority of instances left the capstan at one side of the street or up close to the building
83 being moved, and not in a dangerous position, the plaintiff cannot recover.

17. If the Quick brothers were not in the habit of leaving the capstan in an exposed and dangerous position the plaintiff cannot recover, or if it was not generally so left either through the care of the Quick brothers or of citizens the plaintiff cannot recover.

18. There is no evidence in this case that William Quick is irresponsible, and if he is that is no reason why the village of Holly should be held liable in this case.

Charge of the Court.

GENTLEMEN OF THE JURY: This is an action against the village of Holly to recover damages suffered by the plaintiff in running over a windlass or capstan which had been left by one Quick in the middle of one of the streets of that village. The accident occurred between six and seven o'clock in the evening of November 23d, 1886, Tuesday evening. The night was dark and stormy and apparently neither the plaintiff nor his horse saw the capstan in time to avoid it.

To establish his case and to entitle him to recover the plaintiff must prove negligence on the part of the village of Holly. He is not bound to prove that he was himself not guilty of contributory negligence. The burden of proof as to that is upon the village. At the same time, if you should find either that the village itself was not negligent or that the plaintiff himself was guilty of contributory negligence in driving his horse through the village at an excessive speed, considering the darkness of the night, then,
84 in either case, the plaintiff would not be entitled to a verdict.

There is no question made in this case but that Mr. Quick, who was engaged in moving this barn, was guilty of negligence in leaving this capstan in the middle of the street without any light or guard to prevent its being run into. His negligence in that regard

is not denied, as I understand it, by either side, but the fact that Mr. Quick was negligent does not by any means prove that the village itself was negligent. The village can only be made responsible for its own negligence.

We now come to consider what are the obligations of the village authorities in this connection. We may say generally that the obligation of every muni-pal corporation, like a city or village, is to keep its streets in a reasonably safe condition for travel and remove or guard against obstructions of which it has express or implied notice. For instance, suppose a pit were dug in the center of the street, it would be the duty of the village officers, when their attention was called to it, to see that it was properly guarded and protected, so that persons would not fall into it. At the same time they are not bound to do that immediately upon the pit being dug unless the attention of the village officers is called to it, and they must have a reasonable time to comply with their duty in that regard; and not only is it a principal of general law, but the statutes of this State expressly declare that no action shall be maintained against a village for an injury caused by a defect or an obstruction upon a street or highway unless it is shown that the village has had reasonable time or opportunity to put such highway or street that has become unsafe or unfit for travel in a proper condition to use until it has been shown that proper diligence has not been used in doing this.

If this case rested solely upon the occurrences of the day preceding the injury—that is, upon the moving of this barn upon that day—I should charge you, as a matter of law, that plaintiff was not entitled to a verdict, because the mere fact that this capstan was left unguarded during the afternoon when it was perfectly light and for an hour or an hour and a half after dark would not of itself be evidence sufficient to charge the city or village with negligence in not putting a light upon it. So far as this particular removal is concerned, standing alone, unexplained, and unfortified by other testimony, there is not enough to charge the village officers with negligence in failing to guard or light this capstan. The evidence is that they began to move the barn on Friday, and on Saturday night and over Sunday it was left on the corner of the alley with the capstan placed at the side of the street and not in the center of the street. At any rate, there is no evidence that on Saturday night and Sunday and Sunday night it was not left in a proper place, and I do not see anything that would charge the village officers with negligence in that regard.

With regard to the position of the capstan on Monday night (because they began to move it on Monday) there is some conflicting testimony, the plaintiff insisting that the capstan was left in the middle of the street, unlighted and unguarded. I mean that it was left at a distance from the house so that persons might run into it. (If the capstan were placed close to the house or in the gutter close to the curb it would be said to be guarded so that a person using ordinary care would not run into it.) I say the plaintiff insisting

that the capstan was left in the middle of the street, unlighted
86 and unguarded, and the defendant producing evidence tending to show that the capstan was left that night in a safe place and so near the barn that there was no danger of anybody running into it. The evidence, however, is that on Tuesday they began to move this barn again, and had got it to this point, with the capstan in the center of the street, when a storm came on and the Quicks were unable to work, and that, without due precaution to guard against accidents, they ceased work about the middle of the day, expecting to be able to resume it in a short time; that the storm continued and they left the capstan in the middle of the street and there it remained. Undoubtedly it was the duty of the Quicks to light that capstan or take it away from the center of the street, and if an action were brought against them I think there would be no doubt but that the plaintiff would be entitled to recover unless you found that he contributed to his own injury by fast driving.

The only theroy, however, upon which the plaintiff can recover in this case against the village is that the Quicks have been in the *ah*bit for a number of years, or for a number of successive removals, of removing buildings through the streets and leaving the capstan unguarded, unprotected, and unlighted and in a dangerous position for teams and passengers. If you find that they did that habitually, then I shall leave it to you to say whether the village ought not to have taken some precautions to see that they did not do it in this case, and that will be the main question for you to consider.

The first question will be, Did they habitually leave it unlighted in this way? Because, if they did not or if they were not habitually careless in that regard, the village could not be justly charged with negligence, because the city officers must have had notice of their carelessness to render the city chargeable.

87 Now, notice may be either actual or constructive. There is no evidence of actual notice in this case of the fact that this capstan was unlighted or unguarded; hence the notice that they would be chargeable with would be constructive notice, and that would arise from the fact that the Quicks were guilty of habitual negligence in leaving the building or capstan exposed. So, then, you must find, in the first place, in order to hold the defendant liable, that the village had notice of the Quicks' neglect in the manner of their leaving the capstan, and that notice you must find from the fact that they were habitually negligent of their duty in not lighting or guarding the capstan. The defendant is charged with the duty, as already stated, of keeping in a condition reasonably safe for travel, and this duty requires it to make observations and know the general condition in which its streets are. It is bound to exercise some care and watchfulness for the purpose of seeing whether its streets are in proper condition. Now, if the exercise of a reasonable degree of watchfulness would have informed the defendant that the Quicks were habitually negligent, then you must find that the defendant is actually charged with notice of Quicks' negligence. In other words, the failure of the defendant to notice what it ought to have known is negligence and is no excuse for lack

of knowledge. As I said before, were the Quicks habitually negligent of their duty in that particular?

In the second place, was the neglect of such a character as to charge the city officers with notice of it and to render it incumbent upon them to see that in the moving of this particular barn the capstan was properly lighted or protected? That is a mixed question of law and of fact, to a certain extent. In the first place, were they negligent, generally
88 and habitually, in lighting the capstan, or did it only occasionally happen, only, say, once a year? If that were so I do not think it would be sufficient to give the city notice. The fact that the capstan on two or three occasions, some months or years previous, was left in an exposed and dangerous position would not of itself show that the village was negligent in this instance, and so if the citizens of the village of Holly placed lights on the buildings moved or on the capstan it would tend to show that there was no negligence on the part of the village on this occasion, and the village is entitled to the full benefit thereof in considering the question whether it was guilty of any negligence in this case, because what the village was chargeable with—what their duty to do was to observe whether the capstans were lighted and not to presume that they were lighted, and if they were lighted by anybody, by citizens as well as by the Quicks, that would tend to show that somebody had done its duty or had apprised the public that the capstan was in a dangerous position.

In that connection I also charge you that this very fact to which I call attention, that citizens of the village on various occasions, finding the capstan unlighted and unguarded by the Quicks, themselves hung lights on the capstan, may be considered of some evidence of the notoriety of the Quicks' negligence—that is, that other persons had notice of the negligence of the Quicks in that regard, and that it may have some bearing upon the notoriety of its failure of duty. The marshal of the village, Mr. Herrick, says that he told the Quicks to see that they used care in moving their buildings, called their attention to it, although I do not know that he said——

89 Mr. CARPENTER: That was his testimony on his former trial. There was no such testimony on this trial. All he testified to on this trial was to remove it from this place where it was to the other side of the street.

The COURT: I think we may say that the marshal called the attention of the Quicks to that capstan and notified them to put it in a safe place, and that the evidence is that during Saturday night and Sunday and Sunday night, as I have already said, it was properly protected. He says that he did not observe that it was left in the streets. Now, unless the Quicks were habitually negligent the plaintiff would not be entitled to recover, and upon that subject there was testimony, and much more that I shall have time to call specifically to your attention. On the one hand, the plaintiff has produced a large number of witnesses—there were nearly fifty witnesses sworn in this case—tending to show that the Quicks had a

kind of monopoly of the business of moving buildings in the village; that the- had had that monopoly for a number of years, and that they did not exercise proper care in relation to their buildings generally in lighting the capstan or putting it out of the way. Now, I should have no hesitation in saying—it appeals to anybody's common sense—that persons in moving buildings ought not to leave the capstan in the center of the street in the night-time without its being protected, and, as I said before, there are a large number of witnesses here whose testimony tends to show that the Quicks were negligent in that regard; that they did not pay that attention to the public safety which they ought to have done. On the other hand, there is testimony by a large number of village officers of the village of Holly that they had known the Quicks for a num-
90 ber of years; that they were in the habit of moving buildings; that they were good movers and that they used due care in moving, and I do not know but what the testimony on the part of the defendant, as respects the number of witnesses, is equal to that of the plaintiff.

As I said before, there are about fifty witnesses sworn, and they appear on both sides to be very reputable men, and the testimony for the defendant would tend to show that in the moving of these buildings the Quicks did use due care. Now, I shall leave that testimony for you to consider without going into the details of it or attempt to lay before you the testimony of each witness. It probably would not aid you at all in coming to a conclusion in regard to it. If you find that the Quicks were habitually careless and negligent in leaving this capstan to be run over, unlighted and exposed, and that that negligence was so habitual that in your opinion the officers of the city were chargeable in failing to notice it and without giving them warning and to see that the capstan was lighted, then you would be authorized to render a verdict in favor of the plaintiff, because it is only by virtue of their habitual carelessness and negligence in leaving the capstan exposed that any negligence can be predicated against the defendant in any particular case, for, so far as this case is concerned, there is nothing to show that the officers were chargeable with negligence in failure to see it—that is, this case standing alone. I may say here there is no testimony in this case that William Quick is irresponsible, and if he is that is no reason why the village of Holly should be held liable in this case. The question of the responsibility or irresponsibility of Mr. Quick cuts no figure in the case, and the liability of the village is
91 to be gauged entirely by their own negligence and not the neglect of the Quicks.

Now, gentlemen, one moment to recapitulate this question of negligence: I say, in order to render the village chargeable in this case, you must find not only that the Quicks were negligent in this particular case in leaving the capstan unlighted, but that they had been prior to that time so habitually negligent in that regard that the city officers ought, in the proper discharge of their duties, to have noticed that negligence and to have guarded against it by requiring and seeing to it that the capstan was lighted. If you find

those facts to exist your verdict should be for the plaintiff; but unless you find that they were habitually negligent in that regard, then there is nothing to show that the village officers were neglectful of their duty, and, in such case, the defendant will be entitled to your verdict.

With regard to the question of damages: Cases of this kind, I know, always appeal very strongly to the sympathies of the jury, and while you may be anxious to give this plaintiff damages it ought not to be done unless you find there has been actual negligence on the part of the defendant. The law is no respector of persons, and juries ought not to allow their sympathies to run away with their judgment. At the same time, if you find the village to have been negligent, the fact that the village is a small one, and that the verdict may weigh heavily against them, ought not in any way to affect the amount of the verdict you should render in this case, because the plaintiff is entitled to his actual damages, and those are measured by the direct injuries he has suffered and not by the ability of the defendant to respond. The law measures the amount of the damages by the injury the party has suffered.

92 Now, then, supposing you find for the plaintiff, what damages is he entitled to recover? He is entitled to recover for his pain and suffering in the past, and if you find that his injuries are permanent he is entitled to recover for such pain and suffering as he may endure in the future. He is also entitled to recover for any loss of profit in his business that has been occasioned by his inability to work. There is no evidence tending to show that he was in the habit of earning professionally from three to six thousand dollars per year, and that he has been for some time unable to earn anything like his ordinary income; that his inability today to do that is very seriously impaired, and, indeed, the testimony indicates that he may never be able to resume his practice as a physician as he did before this injury; for that loss, in the future as well as in the past, he is entitled to recover. The testimony indicates very strongly that the plaintiff has suffered serious injuries; that his spine was affected and his ear and eye were affected, and that Bright's disease may have supervened, and the testimony of Dr. McGraw would lead you to believe that it was in consequence of this injury. At the same time, it is my duty to say to you that there is considerable expert testimony on the part of the defendant here tending to show that any injury such as he received would not be followed by Bright's disease; that there is also some testimony tending to show that his paralysis was not so severe and permanent as he swore it was, and perhaps his eye and ear were not injured to the extent he claims they were. There is also expert testimony on behalf of the plaintiff tending to show that the injuries to the head, or through the head to the nervous system, might produce Bright's disease, and it is for you to say what the probabilities are in that connection.

93 Considerable reliance is placed by the defendant upon the fact that last summer he was able to row upon the pond at

Holly; on the other hand, there is some testimony tending to show that Bright's disease would very naturally follow an injury such as he received; in other words, it is a result of the nervous strain to which he was subjected, probably, in receiving this injury; that while it might not result from extravasation of blood in the head that the injury would be produced which might be followed by Bright's disease; but it is for you to say, under all the circumstances, what credence you will give to this testimony with regard to the injury.

Of course, if you find that his injuries are much less serious than they are claimed to be, you are at liberty to reduce the damages to such sum as you think proper, or if you believe he was not injured at all, that he has sworn falsely or grossly exaggerated his injuries and deliberately with regard to the extent of his injuries, you are then at liberty to deny him a recovery altogether for the injuries he has actually suffered or limit him to nominal damages; but otherwise, if you find the defendant has been guilty of negligence here, you are entitled to award him such amount as you think proper, but you must recollect that you must not allow your sympathies to run away with your good sense in this regard any more than you would in determining any other question of fact. You are to use your best judgment and the damages must be measured by his actual injuries and not by the supposed ability of the defendant to respond to them. He is entitled to recover for those injuries, and your verdict must be governed by that and not by any sympathy or by any supposed ability or inability of the village of Holly to pay the amount.

94 One word more and I will dismiss this case. This has been a long an- tedious trial, attended by great expense to both parties, and it is very desirable that you should agree upon a verdict. A disagreement is often a defeat and always a miscarriage of justice. Very few cases submitted to a jury are clear to an absolute certainty. All the law requires is that in civil cases the jury shall determine upon which side lies the preponderance of testimony. In reaching a result it is natural and probable that differences of opinion will arise with regard to the bearing of certain facts and the weight to be given to the testimony of particular witnesses. It is your duty to reconcile these differences of opinion, if it be possible to do so, without yielding your own well-settled convictions as to what the result should be. It is true the parties are entitled to the opinion of each individual juror, yet that does not imply that first impressions may not be changed. It is your duty to listen to each other's arguments in this case with a desire to be convinced, if wrong, and not persist in your own opinion unless it is your own well-settled conviction that you are right. Especially ought you to be wary of dissenting out of mere obstinacy or pride of opinion. Bear in mind that if the case be retried it will be laid before twelve men no more intelligent or impartial or competent than you; that they will meet the same difficulties you have encountered, and that your verdict will put a speedy end to litigation.

This case is in your hands. You will retire in charge of an officer to consider your verdict.

95 *Defendant's Exceptions to Charge.*

The defendant excepts to the refusal of its first, eleventh, thirteenth, and fourteenth requests and to the refusal of each of said requests.

The defendant excepts to the charge of the court in instructing the jury that the plaintiff could recover if the Quicks were habitually negligent in taking care of the capstan in moving buildings.

The defendant excepts to that instruction on two grounds: First, because there is no evidence in the case that would warrant the jury in finding that the Quicks were habitually negligent; and, second, because habitual negligence of the Quicks would not be any ground of action. The defendant also excepts to the charge of the court in submitting to the jury the question whether the alleged habit of the Quicks in taking care of the capstan was so notorious and frequent as to authorize the jury to presume that the village or its officers had notice of it.

The defendant also excepts to that instruction upon the double ground that it would furnish no ground of liability, and also upon the ground that there was no evidence in the case which would warrant a jury or justify them in find- that there was any such notorious or well-known habit or practice on the part of the Quicks in taking care of their capstan.

The defendant also excepts to the charge of the court that the plaintiff could recover if the neglect of the Quicks in taking care of the capstan was so notorious that the village ought to have taken notice of it and guarded against it.

Defendant also excepts to the charge of the court in submitting the case to the jury on the ground that under the laws of the State of Michigan and the decisions of the State supreme court
96 there is no liability in this case, and under the State laws and decisions the rules of law established by the State supreme court in this class of cases are binding upon the Federal courts, the decision of the State court being that under the laws of the State and the charter powers of its municipal corporations, when properly construed, there is no liability on the part of municipal corporations in this class of cases.

This bill of exceptions is settled and signed at the request of said defendant on this 21st day of December, 1889.

HENRY B. BROWN,
District Judge.

Filed Dec. 26, 1889.

WALTER S. HARSHA, *Clerk.*

97 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

GEORGE F. HUNTER
vs.
THE VILLAGE OF HOLLY.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error to the Supreme Court of the United States sued out by the defendant in the above-entitled cause; that the above and foregoing are true copies of the record and proceedings of said court in said cause as the same appears of record and on file in my office; that I have comp-red it with the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 6th day of April, in the year one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: Case No. 14,071. E. Michigan C. C. U. S. No. 372. The Village of Holly, plaintiff in error, *vs.* George F. Hunter. Filed July 2, 1890.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1893.

Term No. 180.

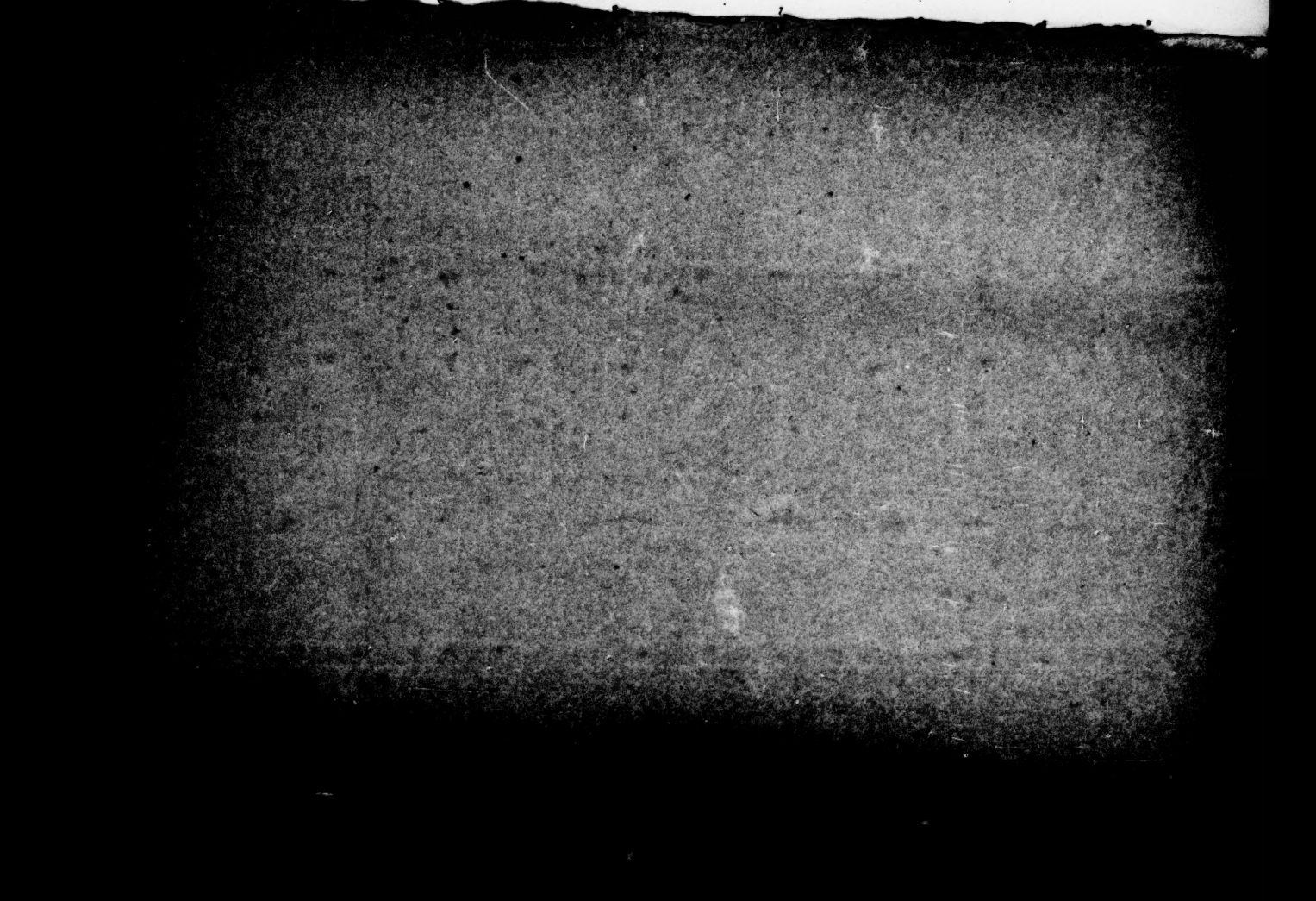
THE VILLAGE OF HOLLY,
Plaintiff in Error,
vs.
GEORGE F. HUNTER,
Defendant in Error.

Brief for Plaintiff in Error.

FRED A. BAKER,
Attorney for Plaintiff in Error.

CHARLES F. COLLIER,
Of Counsel.

DETROIT:
John F. Eby & Co., Printers.
1893.



UNITED STATES OF AMERICA.

Supreme Court of the United States

OCTOBER TERM, 1893.

Term No. 130.

THE VILLAGE OF HOLLY,
Plaintiff in Error,
vs.
GEORGE F. HUNTER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error is a small incorporated village of about 1,300 inhabitants, in Oakland county, Michigan.

Doctor George F. Hunter, an alien, brought an action on the case against the village, in the Circuit Court of the United States for the Eastern District of Michigan, to recover damages alleged to have been sustained by him in being thrown out of his buggy by his driving against a capstan, standing in Oakland street in the village, on the night of the 23d day of November, 1886.

There are two counts in the plaintiff's declaration, in which the negligence of the defendant village is alleged, as follows:

FIRST COUNT.

"Yet the said defendant, well knowing the premises by its officers, duly elected and qualified, to wit, on the 23d day of November, A. D. 1886, wrongfully and unjustly and negligently allowed and permitted one William Quick to draw a barn through said street and have a capstan in the middle of said street, in front of the premises occupied by James H. Cummins, and wrongfully and injuriously and negligently allowed said William Quick to have said capstan in said street, and during the night time of that day, without fixing or placing or causing to be fixed or placed any light or signal at or near said obstruction to denote or show that the same was there as aforesaid."

SECOND COUNT.

"Yet the said defendant, well knowing the premises, at said township of Holly, on the 23d day of November, A. D. 1886, in the evening of said day, at about, to wit, seven o'clock P. M. of said day, and for a long time prior thereto, wrongfully, negligently, knowingly, and injuriously allowed and suffered a certain capstan to be and remain in the center of said Oakland street, at or nearly in front of the land occupied by James H. Cummins, with no light or signal at or near said capstan to denote or show the same was there as aforesaid."

Record, pp. 4, 5.

THE FACTS OF THE CASE.

Over fifty witnesses were sworn in the case, and a condensed statement of the testimony of each is set forth in the bill of exceptions.

The facts of the case, however, are very few and simple, and are easily stated. William, John, and Charles Quick, referred to in the record as Quick Bros., were hous movers, and for a number of years before the accident to Dr. Hunter, had moved build-

ings through the streets of the village, using for that purpose a capstan and chain. On Tuesday, the 23d day of November, 1886, the Quick Bros. were engaged in moving a barn belonging to a Mr. Reynolds, along Oakland street in the village. They quit work about 1 o'clock in the afternoon on account of a storm of rain and sleet. They left the capstan staked down in the centre of the street, about 280 feet from the building. They did not return to their work that afternoon, and did not put any light on the capstan that evening, or otherwise guard it; and about half-past 6 o'clock, and after it had become very dark, Dr. Hunter, in driving along Oakland street with his horse and buggy, drove into the capstan, and was thrown out of his buggy and injured.

These facts appear from the testimony of Dr. Hunter, and that of Jacob Schneider, an employee of Quick Bros.

Record, pp. 9–10, fol. 14.
Record, p. 24, fol. 40.

There is no evidence in the case that between 1 o'clock and half-past 6 the village authorities received any notice that the capstan had been left in the street unguarded, and the learned judge who charged the jury in the court below instructed the jury that as far as the occurrences of that day were concerned there was no such evidence of negligence on the part of the village as to render it liable to plaintiff.

Record, p. 50.

The Alleged Evidence of Negligence.

The testimony relied upon by the counsel of the plaintiff to show negligence on the part of the village is that of a number of witnesses tending to show that upon several prior occasions, extending over a series of years, the Quick Bros. were guilty of similar acts of negligence when they were engaged in moving the Reynolds and other buildings through the public streets.

The different buildings are referred to in the testimony by the names of their owners, that is, as the Reynolds building, the

Bansett building, the Donaldson building, the Church building, the Jenkins building and the Van Every building.

Without referring to the testimony of each witness, except for some special purpose, we will make a statement of the facts disclosed by the testimony relative to the conduct of the Quick Bros. in moving each of the buildings named.

The Reynolds Building.

It appears the Quick Bros. began moving the Reynolds building the prior Saturday; that the building came out of an alley in the rear of Saginaw street, that opens into Maple street; that Saturday night, Sunday and Sunday night, the building stood in the alley, near the entrance of the alley into Maple street, and that the capstan stood in the gutter next to the sidewalk on the opposite side of Maple street, that is, between the traveled part of the roadway and the sidewalk, and not in a place where it would be dangerous to passing vehicles.

Here, again, we have the instructions of the Court below to the jury, that there was no evidence that the capstan was left in any such improper place during Saturday or Sunday nights as to charge the village officers with negligence.

Record, p. 50, fol 85.

On Monday the Quick Bros. moved the building into Maple street, along Maple street into Saginaw street, and north along Saginaw street very near to the corner of Oakland street, where it stood during Monday night. A crosswalk extends from the north side of Oakland street across Saginaw street, and some of the witnesses speak of this crosswalk in describing the location of the capstan that night.

They disagree as to its precise location.

Jacob Schneider says "that the capstan was on the north side of the crosswalk nearly in the center of the street, and remained there that night."

Record, p. 26, fol. 42.

Levi Lapp testified that "the capstan was on the *east side* of the street, *eight or ten feet* from the walk."

Record, p. 23, fol. 28.

Martin Ager testified "that the capstan was to the north of the crosswalk, and a very little to the *west side* of the center of the street."

Record, p. 18, fol. 30.

On cross-examination he testified "the capstan was a little bit *west;* that on the east side of the building and capstan there was room for them to go; that there was room enough for a horse that was not afraid of it."

Record, p. 19, fol. 30.

Wallace G. Jones testified "that the capstan was north of the north crosswalk on Saginaw street; that he should locate it ten feet from the sidewalk on the *east side* of Saginaw street, and ten feet north of the crosswalk."

Record, p. 14, fol. 22.

James H. Patterson testified: "I do not think it was in the center of the road." "He thinks the capstan was a little to the west side of the center of the road."

Record, p. 15, fol. 23.

Further on he testified: "The capstan was about half on the traveled part of the road; that he thinks it was staked on the opposite side of the crosswalk. There was plenty room to go on the *east side* of it; that the road is a four-rod road; that the capstan was about a rod from the sidewalk on the *west side* of the street, about a rod from the fence; that he drove between the capstan and the west fence."

Record, p. 15, fol. 24.

Joseph W. Bedford testified "that the capstan was about in the center of the street, a little on the east side if anything; that it was nearer the east sidewalk than the west, if it was any."

Record, p. 16, fol. 26.

Thomas Smith testified that he drove into the village that Monday evening; "that he drove on the east side of the capstan, then turned and went up Oakland street, and turned south on East street, going between the capstan and the building; that he thinks he drove over a chain."

"When he went home he went right up Saginaw street, passing along on the east side of the building; the building was the Reynolds barn."

Record, p. 27, fol. 45.

The foregoing witnesses were called by the plaintiff.

The witnesses for the defendant village in their testimony locate the capstan the Monday night in question as follows:

Martin F. Chase, a blacksmith, whose shop is on Saginaw street, south of Oakland, saw the building at the corner of Saginaw and Oakland streets about 6 o'clock Monday evening, and as to the location of the capstan, he testified "that when he saw it the capstan was drawn back to the northwest corner of the building; that the capstan was up next to the building when he saw it."

"That he saw the capstan the next morning in the same position before they came down to their work."

Record, p. 30, fol. 50.

Charles E. Rifenberg testified "that the capstan was drawn up close to the building; that he passed by the building that evening, and returned the next morning by the building, and it was in the same condition when he saw it in the evening before."

Record, pp. 31–32, fol. 52.

James H. Cummins testified "that the capstan was right at the left corner; it had been across the crosswalk; it had been drawn right against the west side of the building; that he saw it in the evening and in the morning, as he went away early in the morning on the early train."

"That there was no light on the building or capstan, but the chain and the capstan were close up to the building."

Record, p. 37, fol. 62.

THE DONALDSON BUILDING.

This was quite a large building that was moved from Broad street to Saginaw street and along Saginaw street, in the village, to a lot near Mr. Cook's, by the Quick Bros. in October, 1886.

Jacob Schneider testified "that they were about four days moving it; that they left the capstan wherever night overtook them, sometimes quite a piece off, and sometimes not so far; that he knows of no time when the capstan was left up to the building when they were moving the Donaldson building; that there were no lights at any time upon or around either of them."

Record, p. 24, fol. 40.

On cross-examination his testimony was more definite, viz., "that the building stood one night on Broad street; that the capstan was standing from four to six rods from it in the street; that the next stop was on Saginaw street; that the capstan was near the school house, just in the edge of the street; that the next stop was near the D. & M. R. R., south of it; that the capstan was on the north side of the railroad track, about four rods from the building; that next they stopped right in front of Church's drug store; from there they went up to Starker's, and from there they went to the final place, after staying in front of Starker's one night."

Record, pp. 25–26, fol. 42.

James H. Patterson, Albert M. Taylor, Martin Ager, John Coleman, Aaron A. Hitchcock and Luke McDonald, gave testimony tending to show that when the Quick Bros. were moving the Donaldson building they left the capstan in an exposed position in Saginaw street three different nights, viz., at the corner of Maple and Saginaw, and in front of Starker's, and near Mr. Cook's.

Record, pp. 14, 16, 18, 21, 22.

THE BANSETT BUILDING.

This building was moved along Broad street south to Sherman street, and along Sherman street to a field east of the Detroit &

Milwaukee Railway crossing on Sherman street. The building was moved during harvest time, in July, 1886.

Jacob Schneider testified as to the moving of the Bansett building that it was the first he helped to move; "that the first day they started it until it struck the edge of the sidewalk; that the building was not in the street, and the capstan was across the street over against the sidewalk, and the chain was lying across the street; that some horses would be a little frightened with the chain on the ground, and some would not; that a good many horses would have to be led across; that the capstan was between the driveway and the sidewalk, where the gutter would probably be; that the next day they took it down near the Andrews Hotel on the corner; that night the capstan was left ahead of it, about two rods south of it, pretty much in the center of the street; that the next day it was drawn up to Squire Waldo's and left a little to the side of the street; that the capstan was pulled up close to the building and left there about two or three weeks; that some real dark night some horses might get frightened at it at that place, ordinarily they would see the building if it wasn't too dark; that Mr. Quick spoke to Mr. Waldo in regard to leaving it there; that he could if he did not leave it there too long; that when they went to work again they took it down as far as the flouring mill (side track), where it remained one night; that the capstan was just across the railroad in the street, four to six rods from the building; the next night it was pretty near the field, and the capstan stood just at the edge of the highway."

Record, p. 25, fol. 41.

E. R. Burk, Charles Kellogg, William R. Jones and Frank Hillman gave testimony tending to show that the capstan was left in an exposed position in the street when the Bansett building was at the corner of Sherman and Broad streets, near the Andrews hotel.

Record, pp. 18, 15, 26.

William Green and Frank Hillman gave testimony tending to show that the capstan was left in the street one night from three

to six rods from the building when the Bansett building was on Sherman street near the railroad crossing.

Record, pp. 19, 26.

The foregoing covers all the testimony disclosed by the record tending to show negligent conduct on the part of the Quick Brothers in not taking care of the capstan when moving buildings in the year 1886.

It may be summarized as follows:

In moving the Reynolds building, the capstan was left at or near the center of the street, and three or four rods from the building, during the Monday night next preceding the Tuesday evening when the accident to Dr. Hunter occurred.

This is contradicted by the proofs for the defendant, but inasmuch as the jury found a verdict for plaintiff, we state the case as favorably to the plaintiff as the proofs will warrant.

The Donaldson building was moved in October, 1886, that is, during the month next preceding the accident.

The evidence would warrant the jury in finding that the capstan was left in an exposed position, that is, at or near the center of the street, and some rods from the building, during four consecutive nights, viz., once on Broad street, once near the railroad crossing on Saginaw street, once near the corner of Maple and Saginaw streets, and once in front of Starker's on Saginaw street, with a possible fifth night near Mr. Cook's place on Saginaw street.

The Bansett building was moved during July in 1886.

In moving this building the Quick Bros., according to the testimony, left the capstan in the street, and some distance from the building, during two nights, viz., once at the corner of Sherman and Broad streets near Andrews' hotel, and once near the railroad crossing on Sherman street.

In this connection, it must be remembered that, ordinarily, the nights were not dark enough to make the capstan standing in the street a dangerous object, any more than a building or

any other object that could be readily seen by a man or a horse would have been. It is worthy of note, therefore, that the evidence does not show that the capstan was any annoyance to persons driving along the streets, except on two occasions, viz., when the Bansett building was at the corner of Sherman and Broad streets, near Andrews' hotel, and when the Donaldson building was in Saginaw street in front of the residence of Mr. Starker.

OTHER BUILDINGS.

There is some other evidence in the record relative to the negligence of the Quick Brothers in moving other buildings in prior years.

James M. Anderson testified that the Quick Brothers moved the Kelly-Quick building in the fall of 1884; "that he saw it in the fore part of the day and along about night—sundown—and after they had quit work, and his recollection was that the capstan was near the center of the road; that he should think that the capstan was from four to six rods from the building; that there was no light or guard of any kind on either the capstan or the building; that he don't know as it was necessary, as it was not quite dark yet."

Record, p. 20, fol. 32.

James Coleman testified that the Church building was moved by the Quick Brothers along Saginaw street, about twenty rods, and across the Detroit & Milwaukee railroad track in 1881; "that they left the capstan where they happened to get through with it; that at the close of the day's work if they were two or three rods away from the building they did not unstake it and move it toward the building."

But on his cross-examination he testified to just what they did do with the capstan the two nights the Church building was in the street, as follows: "That the capstan was left up toward the railroad track that night on the north side, and three or four rods from the building; this building was a large building and occupied a good share of the street; that a team could drive on the

east side of it; that they worked it over to the west side of the street so that the east side was unoccupied, and the capstan was between the railroad and the building, leaving the east side of the street for persons to drive; that the building was across the railroad the next night; that the capstan was on the other street right next to the sidewalk."

Record, p. 21, fol. 34.

Luke McDonald testified that the Quick Brothers moved the Jenkins building and the Van Every building. He did not state when the Jenkins building was moved, but the Van Every building was moved "about twelve or fifteen years ago," and as the trial was in July, 1889, it must have been from 1874 to 1879.

He further testified "that when he worked for them they left the capstan wherever it was brought, and would leave it there before dark at quitting time; that it was not their practice to put anything on the capstan to prevent people from running into it."

On cross-examination, however, he testified that the Van Every building stopped one night on Saginaw street; "the capstan was right up to the building; we drawed it up to the building." As to the Jenkins building he testified that it "was moved kitty-cross the street; the capstan was staked on the opposite side of the street; that he can't say the capstan was in the center of the street."

Record, p. 22, fol. 37.

I think I have now stated all of the specific acts disclosed by this record of the Quick Brothers in leaving their capstan over night unlighted and unguarded in an exposed and dangerous position in the traveled part of the public streets and highways of the village.

At the conclusion of the testimony the defendant village, by its counsel, submitted a number of requests to charge, some of which were for the express purpose of raising the question whether any such case was disclosed by the pleadings or proofs as would warrant a verdict for the plaintiff.

These requests were:

1. There is no evidence in this case that the village of Holly or its officers were guilty of any negligence, and the plaintiff cannot recover.

2. That the fact that the capstan remained in the street from noon until the accident, at about six-thirty o'clock in the evening, does not show any negligence on the part of the village or its officers.

10. Under the statutes of the State of Michigan no action can be maintained against a village for an injury caused by a defect in or obstruction of a street or highway unless it is shown that the village has had reasonable time and opportunity after such street or highway became unsafe or unfit for travel to put the same in the proper condition or use, and has not used reasonable diligence therein.

13. The declaration in this case is not based upon the Michigan statute on the subject.

14. Under the laws of Michigan, as construed by the State Supreme Court, the plaintiff is not entitled to recover.

Record, pp. 48, 49.

As abstract propositions, not decisive of the case, the 2d and 10th requests were given by the learned judge who instructed the jury.

Record, p. 50.

But the 1st, 13th and 14th requests were wholly refused, and the case submitted to the jury upon a theory, stated in the instructions given, as follows:

"The only theory, however, upon which the plaintiff can recover in this case against the village is that the Quicks have been in the habit for a number of years, or for a number of successive removals, of removing buildings through the streets and leaving the capstan unguarded, unprotected, and unlighted and in a dangerous position for teams and passengers. If you find that they did that habitually, then I shall leave it to you to say whether the village ought to have taken some precautions to see that they did not do it in this case, and that will be the main question for you to consider."

Record, p. 51, fol. 86.

The learned judge then proceeded to submit the case to the jury upon the theory indicated, and finally summed up his instructions on the question of negligence as follows:

"Now, gentlemen, one moment to recapitulate this question of negligence: I say, in order to render the village chargeable in this case, you must find not only that the Quicks were negligent in this particular case in leaving the capstan unlighted, but that they had been prior to that time so habitually negligent in that regard that the city officers ought, in the proper discharge of their duties, to have noticed that negligence, and to have guarded against it by requiring and seeing to it that the capstan was lighted. If you find those facts to exist, your verdict should be for the plaintiff; but unless you find that they were habitually negligent in that regard, then there is nothing to show that the village officers were neglectful of their duty, and, in such case, the defendant will be entitled to your verdict."

Record, p. 53, fol. 91.

The counsel for defendant duly excepted to the refusal of the Court to give the defendant's 1st, 13th and 14th requests, and also to charge of the Court on the question of negligence as actually given, and in stating his exceptions counsel indicated in a general way the grounds on which he based them.

Record, p. 56.

Verdict and Judgment.

The jury rendered a verdict for the plaintiff of $10,000, on which a judgment was duly entered.

Record, p. 8.

Explanatory Statement.

This case was tried in the court below before Hon. Howell E. Jackson, circuit judge, and Hon. Henry B. Brown, district judge, on the 16th, 17th and 18th days of July, 1889.

Record, p. 7.

The case had been previously tried before the district judge alone. This is indirectly shown by the interruption made by Mr. Carpenter, counsel for plaintiff, during the delivery of the

charge on the last trial, the district judge, in charging the jury for the Court, making use of the stenographic report of his former charge.

Record, p. 52, fol. 89.

As a matter of fact there had been two former trials, both of which had resulted in a disagreement of the jury.

The first trial took place March 6 and 7, 1888, and the second trial November 13, 14 and 15, 1888.

The Federal Court at Detroit had always disagreed with the Supreme Court of the State of Michigan as to what the common law of the State was in this class of cases, and this case was commenced September 14, 1887, in the United States Circuit Court on the common law theory, and as a suit on a common law cause of action, and at the first and second trials, and also at the third and last trial, it was so tried and so submitted to the jury, that is, there was no attempt to recover or pretense of recovering on any State statute on the subject.

Between the second trial and the third trial the decision of the Supreme Court of the United States in *Bucher vs. Cheshire R. Co.*, 125 U. S., 555, decided March 19, 1888, was published, and was called to, or had reached, the attention of the Court, and at the third and last trial District Judge Brown was of the opinion that the decisions of the State Supreme Court were conclusive and binding as authoritative determinations of the local law, but he was overruled in this opinion by the learned circuit judge. At the request of the circuit judge, he performed the office of instructing the jury, and again submitted the case upon the common law theory and from the common law standpoint. As both of these distinguished judges have since become members of the Supreme Court of the United States, it is proper to refresh their recollection with the foregoing statement.

The case of *Detroit vs. Osborne*, 135 U. S., 492, hereinafter referred to, was not decided until May 19, 1890, and the learned judges of the court below may have divided, in view of the extraordinary nature of the plaintiff's case, for the purpose of

making a certificate of division to the Supreme Court of the United States in case the verdict of the jury should be less than $5,000. As the verdict of the jury exceeded that amount, it was thought best to review the case in the ordinary way by bill of exceptions and writ of error.

UNITED STATES OF AMERICA—SUPREME COURT OF THE UNITED STATES.

THE VILLAGE OF HOLLY,
Plaintiff in Error,
vs.
GEORGE F. HUNTER,
Defendant in Error.

ASSIGNMENT OF ERRORS.

And now comes the said village of Holly, the plaintiff in error, by F. A. Baker, its attorney, and says that in the record and proceedings aforesaid, and giving the judgment aforesaid, there is manifest error in this, to wit:

1. The substance of a cause of action is not stated in either of the two counts of the plaintiff's declaration.

2. Neither of the two counts of the plaintiff's declaration set forth a cause of action under the common law as it prevails in the State of Michigan, for the reason that the negligence alleged is one of mere non-feasance in the performance of a public duty.

3. Neither of the two counts of the plaintiff's declaration set forth a cause of action under the Michigan statute approved May 29, 1879, entitled "An act for the collection of damages sustained by reason of defective public highways, streets, bridges, crosswalks and culverts," for the reason that it is not alleged in, nor does it appear from, said counts, or either of them, that the

defendant village had had reasonable time and opportunity, after the street or highway had become unsafe or unfit for travel, to put the same in proper condition for use, and had not used reasonable diligence therein.

4. The Court below erred in refusing to instruct the jury as requested by the defendant in its 1st, 13th and 14th requests, and in refusing each of said requests respectively.

The requests so refused are as follows:

1. There is no evidence in this case that the village of Holly or its officers were guilty of any negligence, and the plaintiff cannot recover.

13. The declaration in this case is not based on the Michigan statute on the subject.

14. Under the laws of Michigan as construed by the State Supreme Court, the plaintiff is not entitled to recover.

5. The Court below erred in giving the following directions and instructions in its charge to the jury:

"The only theory, however, upon which the plaintiff can recover in this case against the village is that the Quicks have been in the habit for a number of years, or for a number of successive removals, of removing buildings through the streets and leaving the capstan unguarded, unprotected, and unlighted and in a dangerous position for teams and passengers. If you find that they did that habitually, then I shall leave it to you to say whether the village ought not to have taken some precautions to see that they did not do it in this case, and that will be the main question for you to consider."

6. The Court below erred in giving the following directions and instructions in its charge to the jury.

"Now, gentlemen, one moment to recapitulate this question of negligence: I say, in order to render the village chargeable in this case, you must find not only that the Quicks were negligent in this particular case in leaving the capstan unlighted, but that they had been prior to that time so habitually negligent in that regard that the city officers ought, in the proper discharge of their duties, to have noticed that negligence and to have guarded against it by requiring and seeing to it that the capstan was lighted. If you find those facts to exist your verdict should be for the plaintiff; but unless you find that they were habitually negligent in that regard, then there is nothing to show that the village officers were neglectful of their duty, and, in such case, the defendant will be entitled to your verdict."

Wherefore the plaintiff in error prays that the judgment aforesaid may be vacated and reversed with costs.

F. A. BAKER,
Attorney for Plaintiff in Error.

ARGUMENT.

I.

It has been settled in Michigan by repeated decisions of the Supreme Court of the State, and these decisions have been recognized as conclusive and binding by the Supreme Court of the United States, that there is no common law liability on the part of the municipal corporations of the State for injuries occasioned by a failure to repair defective highways.

This doctrine was first applied to cities and villages in a case in which the opinion of the Court was prepared by Mr. Justice Campbell, a judge who was distinguished in his State for his knowledge of the common law, and his familiarity with English institutions and history.

Detroit vs. Blackeby, 21 Mich., 84.

The Court had previously applied the doctrine to townships.

Niles vs. Martin, 4 Mich., 557.
Leoni vs. Taylor, 20 Mich., 148.

And had held that a county is not liable for the acts of the Board of Supervisors in the exercise of its legislative power.

Larkin vs County of Saginaw, 11 Mich., 88.

Mr. Justice Cooley dissented in *Detroit vs. Blackeby*, but in subsequent decisions of the Court delivered by him he recognized its binding force.

McCutcheon vs. Homer, 43 Mich., 488.
Grand Rapids vs. Wyman, 46 Mich., 576.

The Michigan Supreme Court has steadily adhered to the doctrine, in cases where it has been called upon to construe statutes creating a liability for defective streets and highways.

Detroit vs. Putnam, 45 Mich., 263.
Agnew vs. Corunna, 55 Mich., 428.
McKeeler vs. Detroit, 57 Mich., 158.
McArthur vs. Saginaw, 58 Mich., 357.
Williams vs. Grand Rapids, 59 Mich., 51.
Davis vs. Jackson, 61 Mich., 530, 533.

These cases have an important bearing on the second proposition or subdivision of this brief, and they will be there analyzed and stated.

The same doctrine prevails in Massachusetts, and in most if not all of the New England States.

Hill vs. Boston, 122 Mass., 344.

The opinion of the Court in that case, as prepared by Chief Justice Gray, is certainly one of the most learned, exhaustive, and able to be found anywhere, and it is not weakened at all by the fact that the Supreme Court of the United States, in *Barnes vs. District of Columbia*, 91 U. S., 540, determined the common law of the District of Columbia to be otherwise, for in that case four of the nine judges dissented, and the case has been followed since then as a binding precedent only, and because Congress, with ample opportunity, has not made any change.

District of Columbia vs. Woodbury, 136 U. S., 450, 457.

The fact that it is settled law in Michigan that there is no common law liability in this class of cases has been expressly recognized and determined by the Supreme Court of the United States.

Detroit vs. Osborne, 135 U. S., 492.

In that case it was also held that the question was one of local law, and that the decisions of the State Supreme Court were conclusive and obligatory upon the Federal Courts.

Mr. Justice Brewer, in delivering the opinion of the court, said:

"But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts, of questions of purely local law. There should be in all matters of a local nature but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan may be entitled, under the Federal Constitution, to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection as, but none other than, those accorded by its laws to its own citizens."

In the case at bar the suit was commenced as a common law action, it was tried as a common law action, and it was submitted to the jury as a common law action.

There is no doubt about this as a matter of fact.

The United States Circuit Court for the Eastern District of Michigan, down to and including the last trial of this case, had steadily refused to follow the decisions of the Supreme Court of the State, and had uniformly held that there was a common law liability for the non-repair of public highways.

As proof of this assertion we make the following quotation from the opinion of Brown, District Judge, denying a motion for a new trial in *Osborne vs. Detroit*, delivered October 25th, 1886, and reported in *32 Fed. Rep., pp. 36, 40.*

"The history of the law of Michigan upon the question of liability for injuries received upon defective sidewalks may not be out of place here. In *City of Detroit vs. Blackeby*, 21 Mich., 84, it was held by a divided court that, in the absence of a statute to that effect, the cities of this State were not liable for damages received by defective sidewalks, and that remained the law of the State until 1879, when the first act was passed. The federal courts, however, had felt themselves bound by precedents of the Supreme Court, and had established a different rule, the consequence of which was that aliens and non-residents were permitted to recover for such injuries when citizens of this State could not do so."

It may be worthy of note that the learned Circuit Judge, whose opinion prevailed in the court below, resided in Tennessee, a State in which there is a common law liability on the part of municipal corporations for not repairing their highways.

Knoxville vs. Bell, 12 Lea., 157.

It is reasonable to believe that a judge whose professional or judicial experience had been in such a State would not yield as readily to the local or State decisions as one coming from a State where the common law liability had been repeatedly denied by the highest tribunal in the State.

Barnes vs. District of Columbia, settled the question for the District of Columbia, in favor of a liability at the common law, but in that case the majority opinion was delivered by Mr. Justice Hunt who came from New York, a State in which that doctrine had been firmly established on intelligible, if not correct grounds, by so learned and distinguished a judge as Mr. Justice Selden.

Hickok vs. Plattsburgh, 16 N. Y., 161.
Weet vs. Brockport, 16 N. Y., 161, note.

And which decisions had been followed and affirmed by Mr. Justice Hunt when he was chief judge of the New York Court of Appeals.

Davenport vs. Ruckman, 37 N. Y., 568, 579.

It is not surprising, therefore, that the learned Circuit Judge, who decided this case in the court below, thought there was a

common law liability, but if *Detroit vs. Osborne* had been decided by this Court at that time, there cannot be any doubt but that he would have directed a verdict for defendant.

II.

There is no statute in Michigan under which the plaintiff can recover.

The first act was passed in 1879.

Public Acts, Michigan, 1879, p. 223.

This act may also be found in *1 Howell's Annotated Statutes of Michigan, p. 418.*

The title and the body of the act mention "public highways, streets, bridges, crosswalks and culverts," but make no reference to sidewalks.

In *Detroit vs. Putnam*, 45 Mich., 263, it was held that the act of 1879 did not include sidewalks.

The opinion of the Court concludes as follows:

"As already said, the city would not be liable in the absence of this statute, which creates the liability, and we cannot, by construction, enlarge the liability. Where a statute attempts, in derogation of the common law, to create a liability, we cannot go beyond the clearly expressed provisions of the act. Such statutes are not to be extended or enlarged in their scope by construction."

At the 1885 session of the State Legislature an act was passed amending the act of 1879 "so as to make said act cover damages sustained by reason of defective sidewalks," and certain other amendments were made by the addition of two new sections.

The purpose of the two new sections was to abrogate the common law liability as it had been enforced in the Federal Courts in Michigan, and to place certain limitations upon the amounts that could be recovered under the statute.

The purpose of the two new sections was not expressed in the title to the amendatory act.

In *Church vs. Detroit*, 64 Mich., 571, the whole act of 1885 was held void, because of the defect in its title.

Among other things the Court, per Marston J., said:

"There is nothing said in the title of the act about adding any new sections, and nothing expressed therein relative to abrogating the common law liability of townships, villages, and cities for or on account of bodily injuries sustained by any person, by reason of neglect to keep in repair highways, crosswalks, etc. So far as section 6 is concerned, it abrogated what this Court had previously held did not exist in this State. But the Federal Courts took a different view, and held that such liability does exist at common law, and suitors in those courts were allowed to maintain actions therefor. Thus the administration of the law was not uniform. Redress could not be had if the injured party was a citizen of the State; but if he happened to be a citizen of another State, or an alien, he could obtain redress in a Federal Court. The object of this section undoubtedly was to abolish the liability at common law of a municipality arising from neglect of duty to keep its streets and highways in repair, and to provide a statutory remedy in the act by which all injured persons should be placed upon the same footing. But this object is not embraced in the title to the act."

In 1887, the act of 1879 was repealed without any saving clause as to existing actions or causes of action; but with some modification all the provisions of the act of 1879 were re-enacted, with sidewalks included in the act, together with an additional section abrogating the common law liability that had been enforced in the Federal Courts.

Public Acts of Mich., 1887, p. 345.
3 How. Stat., p. 3031.

For convenience in comparing the two acts they are here inserted side by side. The variations or differences in language are printed in italics.

An Act for the collection of damages sustained by reason of defective public highways, streets, bridges, crosswalks and culverts.

SECTION 1. The People of the State of Michigan enact, That any person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect to keep such public highways or streets, and all bridges, crosswalks and culverts on the same in *good* repair, and in a condition reasonably safe and fit for travel, by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, crosswalk or culvert, and whose duty it is to keep the same in *good* repair, such township, village, city or corporation shall be liable to, and shall pay to the person or persons so injured or disabled just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.

SEC. 2. If any horse or other animals, or any cart, carriage, vehicle or other property shall receive any injury or damage by reason of neglect by any township, village, city or corporation to keep in repair any public highway, street, bridge, crosswalk or culvert, the township, village, city or corporation whose duty it is to keep such public highway, street, bridge, cross-

An Act to provide for the recovery of damages for injuries caused or sustained by reason of defective public highways, streets, bridges, *sidewalks*, crosswalks or culverts, *and to repeal act number two hundred and forty-four of the public acts of the year eighteen hundred and seventy-nine, being compiler's sections one thousand four hundred and forty-two, one thousand four hundred and forty-three, one thousand four hundred and forty-four, one thousand four hundred and forty-five and one thousand four hundred and forty six of Howell's Annotated Statutes of Michigan.*

SECTION 1. The People of the State of Michigan enact, That any person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect to keep such public highways or streets, and all bridges, *sidewalks*, crosswalks and culverts on the same in *reasonable* repair, and in condition reasonably safe and fit for travel by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, *sidewalk*, crosswalk or culvert, and whose duty it is to keep the same in *reasonable* repair, such township, village, city or corporation shall be liable to and shall pay to the person or persons so injured or disabled just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction.

SEC. 2. If any horse or other animal, or any cart, carriage or vehicle, or other property, shall receive any injury or damage by reason of neglect by any township, village, city or corporation to keep in repair any public highway, street, bridge, *sidewalk*, crosswalk or culvert, the township, village, city or corporation whose duty it is to keep such public

walk or culvert in repair shall be liable to and shall pay the owner thereof just damages, which may be recovered in an action of trespass on the case, before any court of *competent* jurisdiction: Provided, That in all actions brought under this act it must be shown that such township, village, city or corporation has had reasonable time and opportunity, after such highways, street, crosswalk or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein.

(SEC. 3 omitted as not material.)

SEC. 4. It is hereby made the duty of townships, villages, cities or corporations to keep in *good* repair, so that they shall be safe and convenient for public travel, *at all times*, all public highways, streets, bridges, crosswalks and culverts that are within their jurisdiction and under their care and control, and which are open to public travel. And when the means now provided by law are not sufficient to enable any township, village or city to keep its public highways, streets, bridges, crosswalks and culverts in good repair, such township, village or city is hereby authorized to levy such additional sum upon the taxable property of such township, village or city, not exceeding five mills on the dollar in any one year, as will enable such township, village or city to keep its public highways, streets, bridges, crosswalks and culverts in good repair at all times. Highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, crosswalks or culverts, and the care or repairs thereof, are hereby made and declared to be officers of the township, village, highway, street, bridge, *sidewalk*, crosswalk, or culvert in repair shall be liable to and shall pay the owner thereof just damages, which may be recovered in an action of trespass on the case before any court of *common* jurisdiction: Provided, That in all actions brought under this act it must be shown that such township, village or city has had reasonable time and opportunity after *knowledge by or notice to such township, village or city that* such highways, streets, bridges, *sidewalks*, crosswalk or culvert *have become* unsafe, or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein *after such knowledge or notice.*

SEC. 3. It is hereby made the duty of townships, villages, cities, or corporations to keep in *reasonable* repair, so that they shall be *reasonably* safe and convenient for public travel, all public highways, streets, bridges, *sidewalks*, crosswalks and culverts that are within their jurisdiction, and under their care and control, and which are open to public travel, and when the means now provided by law are not sufficient to enable any township, village or city to keep its public highways, streets, bridges, *sidewalks*, crosswalks and culverts in good repair, such township, village or city is hereby authorized to levy such additional sum upon the taxable property of such township, village or city, not exceeding five mills on the dollar in any one year, as will enable such township, village or city to keep its public highways, streets, bridges, *sidewalks*, crosswalks and culverts in good repair at all times. Highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, *sidewalks*, crosswalks and culverts, and the care on repairing thereof, are hereby made

city or corporation wherein they are elected or appointed, and shall be subject to the general direction of such township, village, city or corporate authorities in the discharge of their several duties.

SEC. 5. The provisions of this act shall not apply to public highways which have not been in use ten years; but nothing in this section shall be construed as exempting townships, villages and cities from maintaining their streets bridges, crosswalks and culverts and the approaches to bridges in a safe condition for public travel.

Approved May 29, 1879.

and declared to be the officers of the township, village, city or corporation wherein they are elected or appointed, and shall be subject to the general direction of such township, village, city or corporate authorities in the discharge of their several duties.

SEC. 4. The provisions of this act shall not apply to public highways which have not been in use ten years; but nothing in this section shall be construed as exempting townships, villages and cities from maintaining their streets, bridges, *sidewalks*, crosswalks and culverts, and the approaches ches to bridges in a safe condition for public travel.

SEC. 5. *No township, village or city in this State shall be liable in damages, or otherwise, to any person or persons for bodily injury, or for injury to any property sustained upon any of the public highways, streets, bridges, sidewalks, crosswalks or culverts in such townships, villages or cities, except under and according to the provisions of this act, and the common law liability of townships, villages and cities in this State, for or on account of bodily injuries sustained by any person by reason of neglect to keep in repair public highways, streets, bridges, sidewalks, crosswalks or culverts, is hereby abrogated.*

SEC. 6. *Act number two hundred and forty-four of the public acts of the year eighteen hundred and seventy-nine, being compiler's section (sections) one thousand four hundred and forty-two, one thousand four hundred and forty three, one thousand four hundred and forty four, one thousand four hundred and forty five and one thousand four hundred and forty six of Howell's Annotated Statutes of Michigan is hereby repealed.*

This act is ordered to take immediate effect.

Approved June 27, 1887.

The Supreme Court of Michigan has frequently had occasion to pass upon and construe this legislation.

In *Burnham vs. Byron*, and *Grand Rapids vs. Wyman*, 46 Mich., 555 and 516, the act of 1879 was held effectual and operative both as to townships and cities and villages.

The averments of negligence in the first of these cases are stated by Cooley, J., as follows:

"The duty of the township to keep the bridge in repair is averred, and also that it had notice of the want of repair, and reasonable time and opportunity to repair it, but that it neglected to do so. Also that the highway had been ten years in use."

In the other case the defect was a dangerous hole in a street, that had existed for some ten days without any steps being taken by the city authorities to fill up or cover it. In the trial court the plaintiff was permitted to show similar acts of negligence on the part of the city.

In disposing of this question of evidence, the court, per Cooley, J., said:

"As bearing upon the question of negligence, the plaintiff was suffered to show that *similar defects were frequently suffered to continue* for a considerable time without attention from the public authorities. This evidence might well have been excluded, *for it was wholly immaterial.* The jury had nothing to do with any negligence except that which had resulted in the injury counted upon; and the neglect in this case was shown by the defect being left so long without attention, *and it was neither greater nor less because of previous carelessness or previous attention.* But we do not see how the evidence could do injury. No importance was attached to it in submitting the case to the jury."

In *Dotton vs. Albion*, 50 Mich., 129, the plaintiff stepped into a gap in a crosswalk where several planks were missing.

The trial court took the case from the jury and directed a verdict for defendant.

The Court, per Graves, J., said:

"In making this ruling the court proceeded on the ground that there was no evidence that the opening into which the plaintiff stepped had been there even for an hour, and no evidence that

defendants had notice of its existence until the injury had occurred, and no evidence and no warrant for claiming that they were given the least time or opportunity between the happening of the displacement and the plaintiff's fall to remedy the defect.

"We think this view was too narrow and that very material considerations were excluded by it. It made the whole case turn on the naked effect of the one derangement wholly isolated from all others, and from all reference to the admitted generally bad condition of the way. *Had this particular occasion marked the first and only appearance of a gap, and no other difficulty with the walk had previously existed, the conclusion of the circuit judge would have been correct.* But it was not so, and the duty of the defendant and the rights of the plaintiff could only be settled by attending to all the circumstances."

In *Agnew vs. Corunna*, 55 Mich., 428, the plaintiff's horse was frightened by a large boulder which had been dug out of but left standing in the street, propped up with smaller stones.

Campbell, J., in delivering the opinion of the court, stated a double objection to the plaintiff's case, as follows:

"It is claimed by defendant, in the outset, that the statutory remedy is confined to cases where the want of repair is the immediate cause of the injury, as where there are obstructions or defects in a roadway or bridge where the vehicle in passing over it encounters the mischief complained of. *And it is also claimed that allowing things which are no part of a highway to stand in it temporarily cannot be treated as putting out of repair, which must relate to the way itself, and not to things disconnected from it. This construction of the statute is the natural and correct one.* The statute does not seem to be aimed at indirect and remote mischiefs, but to those which follow from a direct injury caused by the want of repair. A similar question has come up in Massachusetts several times as to the law relating to injuries from things which did not obstruct passage, and it was held that where the damage was consequential, not on the effect of a want of repair, but upon fright caused to a horse which ran away and damaged the vehicle or persons he was drawing, or other analogous cases, it did not come within the rule, and the municipality was not liable. *Cook vs. Montague*, 115 Mass., 571; *Bemis vs. Arlington*, 114 Mass., 507; *Cook vs. Charlestown*, 98 Mass., 80; *Kingsbury vs. Dedham*, 13 Allen, 186; *Keith vs. Easton*, 2 Allen, 552. *The road itself was not out of repair. It was in good order and passable.* If the stone had anything to do with

the action of the horse and damage to the buggy, it was by frightening the animal, and not by hurting or impeding him."

In *McKellar vs. Detroit*, 57 Mich., 158, the plaintiff slipped on a ridge of ice on a crosswalk, and fell and broke her arm.

Held, that she could not recover.

The Court, per Campbell, J., referring to the act of 1879, said:

"The natural meaning of the act, both in the title and in the body, is to create a liability only for having ways out of repair and defective on that account. Several authorities treat the class of obstructions in question as involving want of repair and defects. But in the absence of statutes which provide for them as such, it is not a natural construction, and the cases are more consistent which deal with these things as acts of negligence at common law."

In *McArthur vs. Saginaw*, 58 Mich., 357, a man was thrown out of his buggy and killed in consequence of striking a pile of lumber that was in the street between the sidewalk and the graded and traveled roadway. The lumber had been piled over the ditch or gutter by the owner of an abutting factory.

The Court, Morse, J., dissenting, in an opinion by Campbell, J., held that the plaintiff could not recover, and among other things said:

"We held in *Agnew vs. Corunna*, 55 Mich., 428, that the statutory liability was confined to such defects in streets as arose from their being out of repair, and did not cover objects forming no part of the streets, and not affecting their condition as ways properly kept in repair. We adhere to the opinion there expressed. The whole tenor of the statute is confined to the duties of cities and towns to construct their roads and repair them when out of order. The duty is the same in regard to all of these corporations. But it is manifest that their powers and means of preventing private parties in doing what may interfere with the safety and convenience of passers-by are not at all uniform or co-extensive. These private acts may consist of temporary as well as permanent nuisances, and may cause damage by fright as well as by physical violence, and neither cities nor towns could effectually prevent them in all cases, without ruinous expense and very large means. But it is always possible, at moderate cost, to keep in repair such streets as are worked at all, and that work must be done by the municipality itself in most cases,

and in all cases may be, if neglected, by others. As suggested in *Agnew vs. Corunna*, it is constantly permitted to abutters on streets to occupy portions of the street for longer or shorter intervals with lumber and materials. How far this may safely be done without injury to the traveling facilities of the public must be largely a matter of discretion with the city. The unauthorized or excessive use of such privileges, when what is done does not create what is properly a defective way, is an abuse to be rectified under the police powers of the public, and does not belong to the making or repairing of ways. *There is no more legal necessity for holding cities liable for the failure to enforce their police laws in favor of travelers, than in favor of many other citizens who suffer from nuisances or wrongs. The Legislature seldom imposes responsibility to individuals for that kind of municipal negligence or misconduct.*

"The case before us, upon the allegations, as well as proofs, makes out no corporate liability, and as it is clear that no recovery can be had, the minor questions need not be considered."

In *Williams vs. Grand Rapids*, 59 Mich., 51, the plaintiff was injured at a place where persons were in the habit of crossing a street, but the city had never built a crosswalk there.

Held, that the act of 1879 did not contemplate a right of action against a municipality for not constructing crosswalks.

In *Merkle vs. Bennington*, 68 Mich., 133, the action was a case for injuries received on account of non-repair of a bridge. The injury occurred July 5, 1881, that is, after the act of 1879 was passed, and before the act of 1887. One of the questions in the case was whether the clause of the act of 1887, repealing, without any saving clause, the act of 1879, did not defeat all causes of action which had occurred under the act of 1879.

The Court, per Champlin, J., said:

"When this case was heard, the court called attention of counsel to the repeal of the statute, contained in Act No. 264, Laws of 1887, under which the action in this case was planted. The repeal is in express terms, and without any saving clause. Supplemental briefs have been furnished us on this point. The repealing statute, however, substantially re-enacts the law repealed, with some slight modifications so as to include in the remedy afforded by its provisions damages for injuries received in consequence of the neglect of municipal corporations to keep sidewalks in repair,

and to abolish the common law liability to actions for negligence against such corporations. Upon consideration of the matter, we have concluded that the plaintiff's right of action is not affected by the act of 1887."

The foregoing opinion was followed in two subsequent cases.

Alexander vs. Big Rapids, 70 Mich., 224.
Moore vs. Kenockee, 75 Mich., 332.

In the last case cited the Court, per Long, J., held that there is no difference between the act of 1879 as construed by the Court, and the act of 1887.

At p. 341:

"The words of the act of 1879 would seem to have made the township liable without regard to the question of notice, but the act has always been construed by this Court that it was only liable in case of negligence, and it could not be held to be negligent until after notice, actual or constructive, that the highways or bridges were out of repair; and the act of 1887 evidently was framed to meet this view, and not to impose new conditions."

In *Campbell vs. Kalamazoo*, 80 Mich., 655, the Court, per Cahill, J., at p. 661, said:

"We do not think the statute of 1887 materially changes the rule upon this subject from what we had held it to be under the statute of 1879. The liability of a municipal corporation for negligence has never been held to exist without proof or knowledge of notice of the defect. In such case the basis of the action being negligence, notice of the defect which caused the injury, or of facts from which notice may reasonably be inferred has always been held essential to liability. 2 Dill. Mun. Corp., sec. 1024; Dotton vs. Village of Albion, 50 Mich., 129."

In *Kowalka vs. St. Joseph*, 73 Mich., 322, a drain running along the side of a street was covered with a sidewalk.

Held, that this sidewalk was not a culvert within the meaning of the act of 1879.

In *Southwell vs. Detroit*, 74 Mich., 438, it appeared that the city of Detroit entered into a contract with the Talbot Paving Co. to grade and pave a portion of a street the full width of the roadway, and in doing this work the street was excavated to the depth of about two feet. The contracting company left this excavation

unguarded the night of August 27, 1886, and the plaintiff, with her husband, drove into it and was injured. In the contract between the city and the paving company the latter agreed to erect and light suitable railings or guards around all excavations in such manner as to prevent accidents.

The court, in an opinion by Champlin, J., considered the conflict between the *duty* to keep the streets safe and fit for travel, and the *power* to dig them up to grade and pave them, and held that the city could not escape the duty of keeping the street in repair while it was being paved its full width except by closing it to public travel by the erection of sufficient barriers. The question whether the city was liable for the negligence of the contractor was disposed of as follows:

"The question of the liability of the city or a person who has entered into a contract with another to do a lawful thing in a lawful manner, reserving no control over men or materials, or the manner of performance, otherwise than to see that it is performed according to the contract, for the negligent acts or omissions of the contractor or his servants, has been a subject of much contention, and concerning which many learned jurists differ in opinion. It is needless in this case to rethresh the old straw, for the authorities are pretty much agreed that, where the statute imposes a duty and consequent liability for neglect, 'It rests primarily, as respects the public, upon the corporation, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others by any act of its own' (2 Dill. Mun. Corp., sec. 1027, and cases cited in notes; see also cases above cited)."

Morse, J., was of the opinion that the paving company was an independent contractor, and could not be regarded as the agent or servant of the city so as to make the city responsible for their negligence, but he held the city liable under the statute without regard to the question of principal and agent.

Campbell, J., dissented.

It appears from these opinions that there was no evidence in the case showing how long the excavations had been left unguarded prior to the accident, and the case was not disposed of by the Court as one where the recovery was to be based on the negligence of the city in not repairing within a reasonable time

a defect in the street, and of which the city had received actual or constructive notice.

The very same day that the foregoing case was decided, the Court disposed of a case where an obstruction, consisting of a pile of sand, had been left in the street by third parties for more than a month, wholly unguarded.

Joslyn vs. Detroit, 74 Mich., 458.

The majority of the court, ignoring *Agnew vs. Corunna*, and *McArthur vs. Saginaw*, held that the case was one that should have been submitted to the jury.

Campbell, J., dissented.

In *Dundas vs. Lansing*, 75 Mich., 499, the plaintiff was injured by stepping into a hole in a crosswalk.

A verdict and judgment for plaintiff was set aside and a new trial granted, because the Court below admitted evidence of other defects than that which had caused the injury to plaintiff.

Champlin, J., speaking for the court, at pp. 507, 508, said:

"It must be borne in mind, however, that the knowledge or notice which the statute requires is that of the *particular* defect complained of, and not knowledge or notice of other defects, which, although they are shown to exist to the knowledge of the city, did not occasion the injury alleged.

The longest time the testimony of any witnesses in the case showed the defect in the crosswalk to have existed was six months, and the notice to the alderman was prior to that time; and the notice to the city marshal was something like two years prior to the accident. The notice given was as to the defective condition of the sidewalks generally, and not of any particular defect. Such testimony ought not to have been received. It had no tendency to show actual notice of the defect complained of, and it was too remote and indefinite for the purpose of proving that the particular defect had existed such a length of time that notice might be presumed or inferred. The city cannot be held liable for damages caused by the non-repair of the crosswalk at Butler street by showing that sidewalks in the vicinity were out of repair."

* * * * * * *

"In this case the plaintiff was permitted to produce testimony tending to show generally the bad and defective condition of the

sidewalks a block or more each way from the crosswalk on Butler street. This was error. It is going far enough to hold that it may be shown that accidents have happened to other people who were exercising ordinary care, on account of the particular defect complained of; but such testimony is admissible mainly as tending to show the dangerous character of the defect—in other words, that on account thereof the street or sidewalk or crosswalk was not reasonably safe and fit for travel. Very remotely, and in connection with other testimony showing the length of time the defect had existed, it might have a bearing upon the question of notice to the municipality (*Smith vs. Township of Sherwood*, 62 Mich., 159 (28 N. W. Rep., 806); *Tomlinson vs. Derby*, 43 Conn., 562)."

In *Tice vs. Bay City*, 78 Mich., 209, the plaintiff was allowed to show the bad and defective condition of the walk at other places, beyond the defect which caused the injury.

Held, error.

"Knowledge of one defect is not to be inferred by neglect to repair another."

Fuller vs. Jackson, 82 Mich., 480, 484.

In *O'Neil vs. West Branch*, 81 Mich., 544, the Court, per Champlin, J., said:

"Error is assigned upon rulings of the Court in admitting testimony tending to show other defects in the walk in the immediate vicinity of the defect which caused the injury. We have held the evidence of the other defects of long standing existing in close proximity to the defect which caused the injury is admissible as tending to show notice to the corporate authorities of the defective condition of the walk, and as having some tendency to show notice of the existence of the particular defect complained of. Upon this subject the Court stated to counsel that he should—

'Hold that the parties should confine their evidence to this spot where the injury was received and the vicinity close by. I shall not allow them to go from that spot over a spot that was not defective to another spot within the interval of sound walk.'

"This was as favorable to the defendant as it was entitled to, under the previous rulings of this Court."

In *Hayes vs. West Bay City*, 91 Mich., 418, it appeared that the common council granted a license to La France & Son to move two buildings, "subject to the supervision of the city mar-

shal." They moved one of these buildings into the street, and left it over night with a timber projecting from it ten or twelve feet and from two to two and a half feet above the ground. The marshal saw the projecting timber about 4 P. M., and spoke to La France & Son, and told them he thought it unsafe, but the marshal did nothing, and no lights or guards being used, some time between 7 and 8 o'clock P. M. the plaintiff drove against the projecting timber, and her buggy was upset and she was injured.

Held, that the city was liable. The ground of liability as determined by the Court was stated for the Court by Morse, C. J., *at p. 423*, as follows:

"But this building was being moved under the supervision of the city—in fact, as the license provided that it should be moved, under the supervision of the marshal, a city official. The marshal had notice of the danger of leaving this building after dark, as it was left, without guard or danger signals of any kind. It was his duty to see that ordinary care, at least, was taken to warn passers-by of its presence in the street, and his duty was the duty of the city, and, as the circuit judge correctly charged the jury, his neglect was the neglect of the city."

In *McKellar vs. Monitor*, 78 Mich., 485, the trial court refused to instruct the jury that the plaintiff could not recover unless they found that the highway was used as a public highway for ten years before the accident.

Held, error.

The Court, per Champlin, J., *at p. 290–492*, said:

"Section 4 of Act 264, Laws of 1887, reads as follows:

'The provisions of this act shall not apply to public highways which have not been in use ten years; but nothing in this section shall be construed as exempting townships, villages and cities from maintaining their streets, bridges, sidewalks, crosswalks and culverts, and the approaches to bridges, in a safe condition for public travel.'

"The act comprises six sections. The first gives a remedy to any person who has sustained bodily injury upon any public highway by reason of the neglect to keep the same in reasonable repair. The second gives a remedy to the owner of any animal or other property which receives injury by reason of the neglect by any township, etc., to keep the highway in repair. The third

section enjoins the duty upon townships, etc., to keep in reasonable repair the highways, etc. The fourth section has been quoted above. The fifth confines the remedies for injuries received from the neglect to keep the highways in repair to those given by the act, and abrogates all common law liability. The sixth repeals certain former statutes.

"A correct interpretation of the fourth section requires us to hold that the first clause of the fourth section withholds the remedy given by the first and second sections as to all public highways which have not been in use ten years; at the same time by the latter clause, the duty imposed by section three applies to all highways, whatever the length of time they have been in use as public highways. This duty can be enforced by information or indictment, but a suit for redress for injuries received for such neglect by a private person cannot be maintained unless the highway has been in use as a public highway ten years. This remedy did not exist in Michigan until it was given by this statute, and the Legislature, in bestowing a new remedy, may surround it with such restrictions as they deem proper. Except as noted above, the charge was a very clear and fair statement of the law."

In *Clark vs. North Muskegon*, 88 Mich., 308, it was held that under the act of 1887 it was necessary for the plaintiff to aver in his declaration that the highway was open to the public use at the time of the injury, and that it had been in use for ten years.

In *Fuller vs. Mayor*, 92 Mich., 198, the Court held that the ten-year provision only applied to country or township highways, and did not apply to streets in cities and villages.

The Court, per Morse, C. J., said:

"It will be seen by this proviso that the ten-years use applies only to public highways in townships. A city is bound to keep a sidewalk in safe condition for public travel from the time it is built and opened for travel. The case of *Clark vs. Village of North Muskegon*, 88 Mich., 308, was decided by us without a careful examination of the statute, as it was conceded by plaintiff upon the argument that it was necessary to prove on the trial the existence of the street for the period of ten years."

No reference was made to *McKeeler vs. Monitor*, 78 Mich., 485, which was a country or township highway case.

In *McGrail vs. Kalamazoo*, 94 Mich., 52, it appeared that the city sidewalk inspector examined the walk and put it in repair about ten days before the plaintiff was injured.

The following instructions of the Court below to the jury were sustained:

"If the jury find from the evidence that the sidewalk inspector went over that walk a fortnight before the accident, and tested the planks at the ends, and found the walk secure at that time; or, finding defects, remedied them, so that the walk was left in a condition reasonably safe for public travel, then the city would not be responsible or negligent as to loose planks which had been in the walk before; and if any defect developed in the walk after that, *it must have been of such a character as would have naturally arrested the attention of the passer-by in order to have charged the city with such constructive notice as would make it liable;* and after such defect was noticeable the city must have had *reasonable time to repair it;* and if the defect was not of such a character you will find for the defendant."

In the case at bar there are three reasons why the plaintiff's case cannot be sustained under these acts of the Legislature, as they were at first construed by the State Supreme Court.

1. The obstruction which caused the injury to the plaintiff was an object left in the highway by an independent wrongdoer, and it did not consist of any defect or imperfection in the street or highway itself.

2. It is not alleged in the plaintiff's declaration, nor was it proven on the trial, that the street on which the accident occurred had been in use as a public highway for ten years.

3. It appears that at the time of the accident the village had not had any actual or constructive notice that the street had, in point of fact, become unsafe and unfit for travel, and had had no opportunity, reasonable or otherwise, to put the same in proper condition for use.

We are free to confess that the later decisions of the State Supreme Court have deprived us of the first and second of the above reasons.

But the third and more vital and meritorious reason is strengthened and made impregnable by the decisions of the Supreme Court of Michigan, construing these acts.

The act of 1879 was plain enough, but the changes made by

the act of 1887 put an end to all controversy on the subject. There is no such thing as a recovery under this legislation, unless the municipality has had a reasonable time and opportunity after actual or constructive notice that the highway has become unsafe for travel to put it into proper condition for use.

This is an express and positive statutory requirement applicable to all cases where the defective or unsafe condition of the street or highway was not caused directly or indirectly by the municipality itself.

The decisions of the State Supreme Court that it is not material or competent to prove that the municipality had neglected to repair other defects or imperfections not in the immediate vicinity of the defect or imperfection that caused the injury, are conclusive on the question whether the prior negligent acts of the Quick Brothers in not caring for their capstan, furnish any evidence on which to base a liability.

It is a question of notice, and notice of one defect or of one negligent act, is not notice of another.

And notice that the Quick Brothers have been guilty of a number of negligent acts, is no more notice that they will be guilty of a similar negligent act in the future, than that notice of a number of defects in the streets is notice of another particular defect at which a person may have been injured.

In *Donaldson vs. Boston*, 16 Gray, 508, the injury was caused by a plumber's furnace standing in the street, and the plaintiff offered to prove that it was left standing in the street the day before.

Bigelow, C. J., for the court, said:

"Evidence that the furnace had been in the same place on the sidewalk of the street the day previous to the accident was irrelevant and immaterial to the issue. If it occasioned a defect or obstruction, its removal at nightfall abated the nuisance, and the the defendants were then in no default in the performance of their duty. The street was safe and convenient until the furnace was again placed within its limit on the next day. But this was a separate and independent act, by a person having no authority or license from the defendants, occasioning a new obstruction to

public travel, which had no necessary connection with that existing on the day previous, and of which the acts done on the day previous could give no notice, either actual or constructive, to the defendants. Existence of a previous defect or nuisance, which has been removed, has no tendency to prove a subsequent one, or to show notice to the city that another similar obstruction will be created. It was therefore incompetent for the plaintiff to show any facts in relation to the use of the furnace within the limits of the street on the day before the accident occurred."

Notice of one defect is not notice of another, even when both are in the same sidewalk.

Goodson vs. Des Moines, 66 Ia., 255.

III.

There is no law of municipal negligence anywhere under which the plaintiff's case can be sustained.

Assuming that it is shown by the record that the defendant village might have anticipated, and on Tuesday the 23d day of November, 1886, ought to have anticipated the particular act of negligence of the Quick Bros., which resulted in the injury to the plaintiff, and at nightfall on that day, to have done whatever was necessary, by the erection of barriers, the placing of lights, or the removal of the capstan from the street, to protect those who might drive along the street during that night, from injury, still we submit, with a great deal of confidence, that this was not such kind of negligence as would enable a private action for damages to be maintained thereon.

The primary cause of the accident to the plaintiff was the illegal and negligent act of the Quick Bros. in leaving the capstan in the street for the night wholly unguarded and unlighted.

The defendant village was not responsible for this act of negligence on the part of the Quick Bros., except so far as the village authorities failed to prevent it, and that failure must be and is based entirely on the fact that the Quick Bros. had previously been guilty of similar acts of wrongdoing and of negligence,

and so frequently, that the village authorities ought to have known that the Quick Bros. were going to be negligent on the night of the day when the accident to the plaintiff occurred.

The Quick Bros. were independent wrongdoers acting wholly disconnected from the village, and not with, under or for it in any way, so that the village authorities were in error only in not suppressing these wrongdoers, and in not preventing them from doing the particular act of negligence which resulted in the injury to the plaintiff; but this is not the kind of municipal negligence on which a private action for damages can be maintained.

The village of Holly was re-incorporated in 1881, and was made subject to the general law relative to incorporated villages.

Local Acts Mich., 1881, p 234.
1 How. Stat. Mich., p. 707.

The general act confers power on the village council as follows:

"The council shall have power to prohibit and prevent obstructions and incumbrances in, and encroachments upon the public highways, streets and alleys of the village, and remove the same; and to punish those who shall obstruct, encumber, encroach, or maintain any encroachment upon or in any such highway, street or alley, and to require all such persons to remove every such obstruction, incumbrance and encroachment."

1 How. Stat., Sec. 2866.

"The council may regulate the use of public highways, streets, avenues and alleys of the villages, subject to the right of travel and passage therein. They shall have authority to prescribe the stands for all vehicles kept for hire, or used for the transportation of persons or property for hire; to designate the places where loads of wood, coal, hay and other articles may stand for sale; to regulate traffic and sales in the street and upon sidewalks; to regulate or prohibit the display, use or placing of signs, advertisements, banners, awnings, posts and telegraph poles in or over streets; to prohibit immoderate riding or driving in the streets or over bridges; to regulate or prohibit all such sports, amusements, proceedings and gatherings of crowds in the streets as may interfere with the lawful use thereof, or render travel or passage therein inconvenient or unsafe; to prohibit and prevent the running at large of horses, cattle, swine, dogs, geese and other domestic animals or fowls, in the streets or elsewhere in

the village, and to impose penalties upon the owners or keepers thereof permitting the same, and to require or authorize the destruction of dogs found at large contrary to the ordinance of the village; to cleanse and purify the streets, and to prohibit, prevent, remove, and abate all nuisances therein, and to require the authors and maintainers thereof to remove the same, and to punish them for the creation or maintenance thereof, and generally to prescribe and enforce all such police regulations over and in respect to the public streets as may be necessary to secure good order and safety to persons and property in the lawful use thereof, and to promote the general welfare; and in addition to all other powers herein granted, the council shall have the same authority and powers over and in respect to the public streets of the village as are conferred by law upon highway commissioners in townships."

1 How. Stat., Sec. 2869.

In *Griffin vs. Mayor*, 9 N. Y., 456, the plaintiff was injured by driving into a pile of rubbish deposited on the street by an abutter.

The Court had previously held that under the 175th section of 2 Rev. Laws of N. Y. of 1813, the city of New York was liable for injuries sustained by a passenger in consequence of a street being out of repair. (*Hutson vs. Mayor*, 9 N. Y., 163; *Mayor vs. Furse*, 3 Hill, 612.) But in this case the Court held there was no liability. Denio, J., for the Court, said:

"The present case is not within the statute or the principles of these decisions. Chambers street is not shown to have been out of repair. It is one of the old paved streets of the city, and, for aught that appeared, the pavement was unbroken and in perfect order. The difficulty was that certain persons, in violation of the city ordinances, had placed encroachments upon this street, rendering its use inconvenient and to a certain extent dangerous. It did not appear that either the common council or any of its officers had notice of the existence of the nuisance, nor was it shown to what extent or under what restrictions individuals engaged in building may make use of portions of the street for a temporary deposit of the materials and rubbish. That subject is provided for in the city ordinances. It is improbable that any ordinance would have justified these piles of rubbish to have remained in the street for the length of time mentioned, if, indeed, it was not the duty of the parties concerned to have removed them individually. By sec. 195 of the act just referred

to, it is made penal for any person to put or leave any unnecessary obstructions in any of the roads of the city; and although this provision does not embrace the streets, strictly so called, there is no doubt but that the authority which the corporation possesses, to make all needful by-laws and ordinances for the good government of the city, confers upon it ample power to adopt suitable regulations upon this subject, nor but that the power has been exercised by the enacting of a series of rules deemed adequate to the exigencies of the case. The functions of a common council, as applied to this subject, are those of a local legislature, within certain limits, and are not of a character to render the city responsible for the manner in which the authority is exercised, or in which the ordinances are executed, any more than the State would be liable for the want of adequate administrative laws, or for any imperfections in the manner of carrying them out. The wrong complained of in this case arose either from the want of suitable municipal regulations or from some negligence in the city officers in ascertaining the existence of the obstruction or seasonably applying the proper remedy. A doctrine which should hold the city pecuniarily liable in such a case would oblige its treasury to make good to every citizen any loss which he might sustain for the want of adequate laws upon every subject of municipal jurisdiction, and on account of every failure in the perfect and infallible execution of those laws. There is no authority for such a doctrine, and we are satisfied that it does not exist."

Allen J., after referring to some other cases said:

"But in the case before us, the placing and continuing the obstruction in the street was the act of a third person, a stranger to the defendants, and for whose acts they were not chargeable. The primary duty of removing the encroachment was upon him who placed it there, and not upon the defendants. The duty of the defendants in the premises was rather executive, to compel an observance of the ordinances of the city by the wrongdoer, than themselves to remove the obstruction. If the encroachment upon the street was unlawful, it was a nuisance, and the remedy palpable and easy: 1. Any citizen might lawfully abate it by his own act (Bac., Abr., tit. Nuisance, C); *Wetmore vs. Tracy*, 14 Wend., 250. 2. The individual who created and continued the nuisance was liable to indictment; 3. An action would lie against the wrongdoer at the suit of any individual who should sustain any damage peculiar to himself and which was not common to the public: *Pierce vs. Dart*, 7 Cow., 609.

"There is no precedent for the action, and no principle upon which it can be sustained."

In *Fowle vs. Alexandria*, 3 Pet., 398, the action was to recover damages because the municipality had licensed an auctioneer without requiring him to give bonds as required by law, and by an ordinance.

It was held that the municipality had no power to issue a license, or to require a bond; but not stopping there, the Court, in an opinion by Chief Justice Marshall, further says:

"If the declaration is to be considered as stating the cause of action to be the granting a license without previously requiring a bond, it will not, we think, help the case. The common council has granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavernkeeper, or any other person who may carry on any business under a license from the corporate body.

"Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers in granting a license which it had not authority to grant without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license? We find no case in which this principle has been affirmed.

"That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."

A city is not liable for negligence in failing to suppress a mob.

Western College vs. Cleveland, 12 Ohio St., 375.
Prather vs. Lexington, 18 B. Mon., 559.

Or, for not preserving the public peace and protecting private property.

Hart vs. Bridgeport, 13 Blatch., 289.

Or, for the negligence of a city official in not having a wall taken down after a fire, or otherwise preventing it from falling into the street and injuring persons passing along the street.

Howe vs. New Orleans, 12 La. An., 481.

Or, for not preventing a dangerous wall from falling on to adjacent property.

Kiley vs. Kansas City, 87 Mo., 103.
Cain vs. Syracuse, 95 N. Y., 92.

Or, for negligence in not maintaining a sufficient fire department or reservoirs for the protection of property from loss by fire.

Brinkmeyer vs. Evansville, 29 Ind., 187.
Grant vs Erie, 69 Pa. St., 420.

Or, for not enforcing an ordinance prohibiting swine or cattle from running at large in the streets.

Rivers vs. Augusta, 65 Ga., 376.
Kelly vs. Milwaukee, 18 Wis., 83.
Levy vs. New York, 1 Sandf. Sup. Ct., 465.

Or, for not preventing the firing of cannon in the streets.

Boyland vs. New York, 1 Sandf. Sup. Ct., 27.
Norristown vs. Fitzpatrick, 94 Pa. St., 121.

Or, for permitting, by ordinance, a particular street to be coasted on.

Burford vs. Grand Rapids, 53 Mich., 98.

Or, for not suppressing coasting that had been rendered illegal by ordinance.

Faulkner vs. Aurora, 85 Ind., 130.

Or, for not suppressing coasting that had become a public nuisance.

Ray vs. Manchester, 46 N. H., 59.
Hutchinson vs. Concord, 41 Vt., 271.
Shephard vs. Chelsea, 4 Allen, 113.
Schultz vs. Milwaukee, 18 Wis., 254.

Or, for not enforcing an ordinance fixing certain fire limits within which wooden buildings should not be erected.

Haines vs. Charlotte, 72 Mich., 278.

Or, for failing to prohibit the manufacture of fireworks in its corporate limits.

McDade vs. Chester, 117 Pa. St. 415.

Or, for not constructing large enough culverts or sewers.

Rochester White Lead Co. vs. Rochester, 3 N. Y., 463.
Mills vs. Brooklyn, 32 N. Y., 489.
Detroit vs. Beckman, 34 Mich., 125.

Or, for not suppressing public nuisances.

Armstrong vs. Brunswick, 79 Mo., 319.

The correct rule for the determination of the question of municipal liability in any case may be stated as follows:

When a duty is of a legislative or judicial nature, or, in other words, of a discretionary character, the corporation is not subject to action for damages; but if the duty is a ministerial one, the corporation is subject to private actions for neglect thereof.

Where discretionary duty ends, and ministerial duty begins, there immunity ceases and liability attaches.

Apply this rule to the case at bar, and the plaintiff's case cannot be sustained. The failure of the defendant village to suppress and prevent the negligent acts of the Quick Brothers was neglect of a public, governmental and wholly discretionary duty, and no ministerial duty existed until the Quick Brothers quit their work on the afternoon in question and left the capstan standing in the street for the night, unguarded and unlighted.

But, as we have seen, and as the court below held, there was no such violation of this duty as to make the defendant liable.

We have not been able to find any decision anywhere, either at common law or under a statute, in which a case like the one at bar has been sustained, and this would seem to be conclusive evidence of the law on the subject.

We respectfully submit that the judgment below should be reversed.

FRED A. BAKER,
Attorney for Plaintiff in Error.

CHARLES F. COLLIER,
Of Counsel.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1893.

Term No. 130.

THE VILLAGE OF HOLLY,
Plaintiff in Error,
vs.
GEORGE F. HUNTER,
Defendant in Error.

Brief for Defendant in Error.

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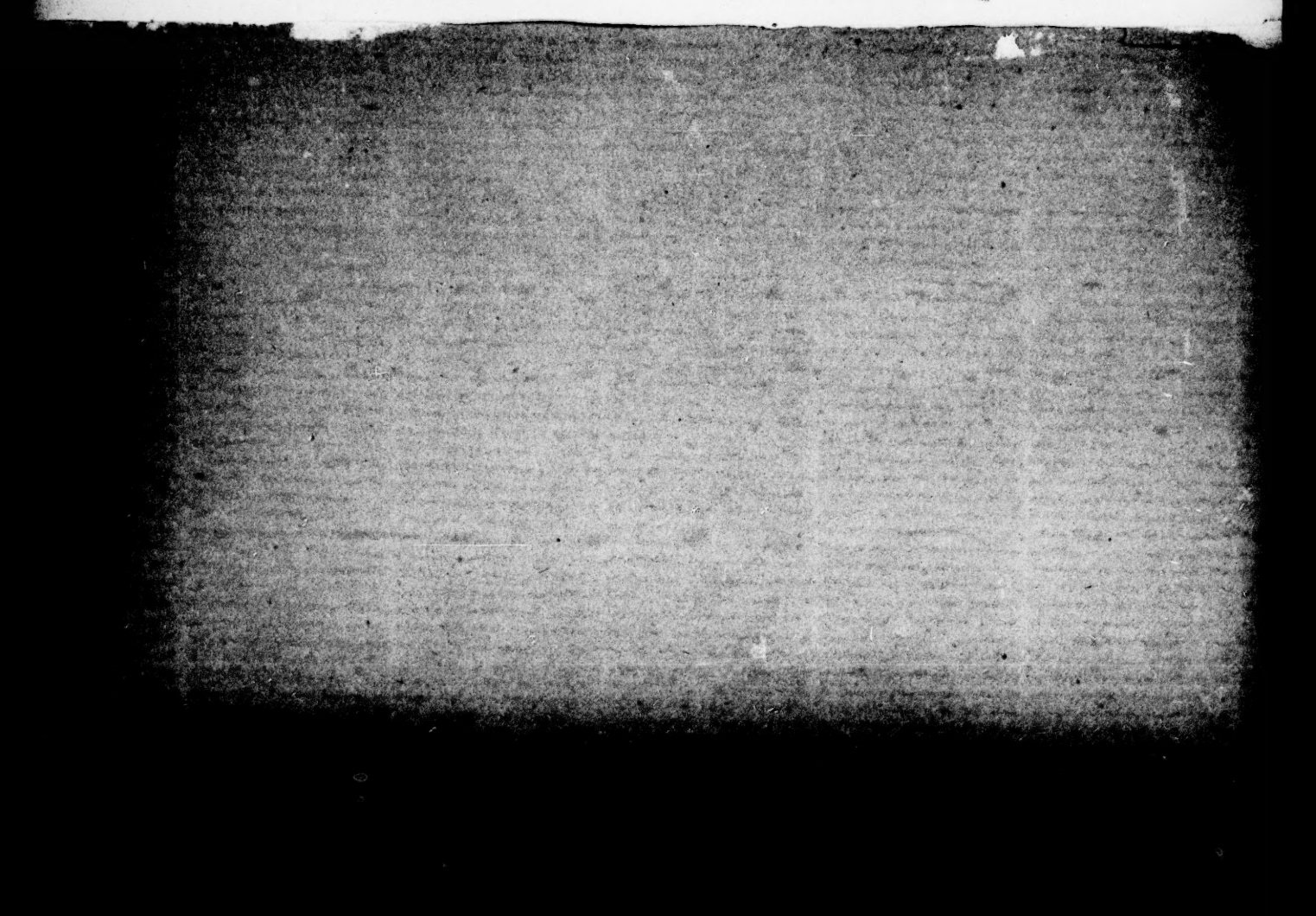
DETROIT:
John F. Eby & Co., Printers.
1893.



UNITED STATES OF AMERICA.

Supreme Court of the United States

THE VILLAGE OF HOLLY,
Plaintiff in Error,
vs.
GEORGE F. HUNTER,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF CASE.

On Tuesday evening, November 23, 1886, after dark, the plaintiff, a practicing physician, drove from East street, in the village of Holly, on Oakland street, and then turned west. He had gone but a short distance when his carriage collided with an unlighted and unguarded capstan or windlass. He was thrown violently to the ground and seriously injured.

The capstan was placed and left where it was by one William Quick. Quick was making use of the same to move a building known as the "Reynold's barn" through the streets of the village. This barn, when plaintiff collided with the capstan, was east of the intersection of Oakland street, and about 280 feet east of the capstan.

Defendant in error claims that the evidence establishes the following propositions:

(1) The village officials of the defendant corporation knew that Quick was moving the building through the streets by the use of the capstan, and permitted him to do so.

(2) William Quick, either alone or in association with one of his two brothers, John and Charles, had been engaged in moving buildings in the village of Holly for many years prior to the 23d day of November, 1886, and during that time had moved all or nearly all of the buildings moved in the village.

(3) William Quick and the Quick Brothers, while engaged in moving buildings through the streets of the village, were in the habit, whenever they rested from their labors, of leaving both the building and the capstan by which it was moved, in the condition and position in which they then were.

(4) The officials of the defendant, the village of Holly, were chargeable with notice of the negligent custom of the Quicks, stated in our third proposition, and took no step to prevent injury to those endangered thereby.

We shall discuss each of these propositions separately:

(1) The village officials of the defendant corporation knew that Quick was moving the building through the streets by the use of the capstan, and permitted him to do so without any interference or direction. While no express permission or license was given for the moving of the building, John Ford, street commissioner of the defendant corporation, saw the building raised and knew where it was going (Record, p. 18).

Lyman Herrick, marshal of the defendant corporation, saw them just as they were moving the building and capstan into the street on the Saturday evening prior to the plaintiff's injury (Record, p. 44).

Martin F. Chase, one of the members of the village council, saw the building Sunday morning (it then stood at the intersection of the alley and Maple street). He saw the building at the corner of Saginaw and Maple streets (this would be on Monday),

and saw it again Monday night at the corner of Saginaw and Oakland streets (Record, p. 30).

Howard Church, another village councilman, kept a store in the block from which the barn was moved, and saw the same being moved on Saginaw street (Record, p. 42). The building was moved a short distance on Maple street and Saginaw street on Monday (Record, p. 12), and on Oakland street on Tuesday. Saginaw street was the most important street in the village, and Oakland street third in importance (Record, p. 10). Maple street is one of the most important streets in the village (Record, p. 43).

That these officials permitted Quick to proceed with his work without any interference or direction is shown by reference to the pages of the Record above referred to.

(2) William Quick, either alone, or in association with one of his two brothers, John and Charles, had been engaged in moving buildings in the village of Holly for many years prior to the 23d day of November, 1886, and during that time had moved all or nearly all the buildings moved in the village.

William Green (Record, p. 19) testifies: Have known of Charles, William and Jack Quick moving buildings in the village of Holly. That he can remember as long as twelve years and maybe longer; that he don't remember of any other person moving buildings in Holly.

James M. Andrews (Record, p. 20) testified: Knew of buildings being moved by the Quick Bros., John, William and Charles; that he don't recollect of anybody else moving buildings there for the last 15 or 20 years.

William H. Hall (Record, p. 29) testifies: They have done the principal part of the moving of buildings in the village of Holly for about 20 years. There is nothing to contradict this testimony, and the Court charged the jury (Record, p. 53), to which no exception was taken, that there was evidence tending to show that the Quicks had a kind of monopoly of the business of moving buildings in the village

(3) William Quick and the Quick Brothers, while engaged in moving buildings through the streets of the village, were in the habit, whenever they rested from their labors, of leaving both the building and the capstan by which it was moved, in the condition and position in which they then were.

In the summer of 1886 William Quick had moved a building, called the "Bansett building," through the village of Holly (Record, p. 15). This building was moved on Broad street (Record, p. 25), next to Saginaw street, the most important street in the village (Record, pp. 10 and 43). It was being moved through the streets more than two weeks. During that time both the building and the capstan were left at nights, and at days, when work was not being done, in the position and condition in which they stood when work was temporarily suspended. The capstan being staked down in the street unlighted and unguarded (Record, pp. 24 and 25).

In October, 1886 (Record, p. 14), William Quick moved a building, known as the Donaldson building, through the streets of the village. This building was moved on Saginaw street and on Broad street, respectively the first and second streets of the village in importance (Record, pp. 24, 25 and 12). The building and the capstan stood on Broad street one night and on Saginaw street four nights both unlighted and unguarded, and the capstan staked down in the street in precisely the position and condition in which they were when the time to suspend labors came (Record, pp. 24 and 25).

The night before plaintiff was injured William Quick left the Reynolds building and the capstan, both of them unlighted and unguarded, in the position in which they were when night came, at the corner of Saginaw and Oakland streets in the village of Holly (Record, pp. 24 and 25). On these various occasions the capstan stood at varying distances (ranging from the length of the sweep to several rods) from the building.

On the afternoon preceding the evening of plaintiff's injury it commenced raining about 1 o'clock. Quick suspended his

labors, leaving the capstan unlighted and unguarded at a distance of 285 feet away from the building (Record, p. 31).

In the fall of 1884 they moved the Kelly-Quick building, pursuing the same custom (Record, p. 20). In 1881 they moved the Church building, pursuing the same custom (Record, p. 21). Either in 1884 or 1885 they moved the Andrews building, pursuing the same custom (Record, pp. 47 and 48). They moved a couple of buildings for a Mr. Cotherall, and pursued the same custom (Record, p. 35).

In addition to these, they had moved other buildings, pursuing the same custom. (See the testimony of Burnham, Record, p. 26; the testimony of Hillman, on page 27; the testimony of Hall, on page 30; the testimony of Green, on page 19; the testimony of Taylor, on pages 16 and 17.)

Luke McDonald, who for six or seven years worked for William Quick and John Quick, who were then working together, says (Record, p. 22) "that when he worked for them they left the capstan wherever it was brought, and would leave it there before dark at quitting time. It was not their practice to put anything on the capstan to prevent people from running into it."

The testimony of the defendant, introduced for the purpose of showing that the Quicks were not habitually negligent, really establishes our third proposition.

On the question of habitual negligence defendants swore 26 witnesses. Of this number only ten, viz., witnesses Evans, Johnson, Van Every, Baird, Bogart, Baldwin, Church, Mothersill, McGonegal and Brewster testify to ever having seen a light either on the building or capstan. They point out but one instance when a light was hung out during the time that the Donaldson building was being moved, and that evening the light was hung on the building; they point out but one instance when a light was hung out during the time that the Bansett building was being moved, and that light all the witnesses, except witness Evans, testify was on the building. So that it is a fair inference from

the testimony of defendant's own witnesses that no light was put on the capstan during the moving of either the Bansett or Donaldson buildings. Aside from these two occasions upon which testimony is given that lights were hung up, witness Bogart testifies that a light was put upon the Gardner building, which had been moved four or five years earlier.

Witness Church testifies that a light was put upon the Church building, a building moved for him by the Quicks; and witness Mothersill testifies to seeing a light on an occasion not specified (Record, p. 43).

Witness Baldwin testifies to seeing a light on a capstan twice, once on Broad street and once on Saginaw street (Record, p. 41).

There are thus pointed out four, possibly five, occasions that witnesses have seen light upon a building; and two, possibly three, occasions that they have seen a light upon a capstan. The fact that these 26 witnesses can give only seven instances of having seen lights either on the building or capstan, is almost conclusive that lights were not often seen, as defendant's witness Van Every frankly admitted. (Record, p. 34.)

The president of the village, witness McGonegal, frankly admits that he had seen the capstan out in the street at varying distance from the building a great many times that night, and had never seen a light but once, and that was on the building. (Record, p. 46.)

Even upon these occasions, when, according to this testimony, a a light was seen upon the building, the capstan was frequently unlighted and unguarded, and in a dangerous position.

For instance, witness Johnson testifies that the evening when he saw the light on the Bansett building, the capstan was in the street about four rods away, and that there was no light on it (Record, p. 33); that there was only one light on the building, and if one was coming from the north, this light could not be seen. (Record, p. 34.)

Witness Church testifies that when he saw the light on the building the capstan was possibly four or five rods from the building. (Record, p. 24.)

Of defendant's 26 witnesses, but five, viz., Pomeroy, Slocum, Waldo, Bogart and Barrett, testify to the Quicks having adopted any other precaution to protect travelers from danger than that of hanging out lights, viz., that of moving back the capstan. They testify to such a precaution twice when the Bansett building was being moved, once when the Donaldson building was being moved, and once when they moved some building for witness Pomeroy. There are thus only four instances specified in which the Quicks moved the capstan back against the building. This was not an adequate protection. For instance, one instance specified was when the Bansett building was being moved on Sherman street. The street was four rods wide without ditches. The building was 18 or 20 feet wide and stood inside the sidewalks. The capstan stood the length of the sweep away from the building, presenting certainly a dangerous obstruction to travel, and it is not to be wondered at that one of the members of the council, witness Slocum, noticed it all the time for fear something might happen (Record, p. 40).

The fact that so few instances can be given of the moving of the capstan back even by witnesses who had observed the capstan a great many tines, as had witness McGonegal, for instance (Record, pp. 45 and 46), demonstrates that the practice of the Quicks was the other way.

(4) The officials of the defendant, the village of Holly, were chargeable with notice of the negligent custom of the Quicks, as stated in our third proposition.

We contend that these officials had both actual and constructive notice of the negligent custom of the Quicks. There was actual notice, because the village marshal, Lyman Herrick, the village president, James McGonegal, members of the council H. M. Church, W. W. Slocum and L. H. Ripley, were all informed of instances tending to establish the negligent habit of William Quick in the particular above referred to. E. R. Burk and Charles Kellogg collided with the capstan on Broad street when the Bansett building was being moved, and informed Her-

rick of that fact (Record, pp. 13 and 14). He was informed by A. N. Smith that the Quicks had left the capstan in bad shape when they were moving the Donaldson building on Saginaw street (Record, p. 45). One evening, in getting around the Donaldson building, he had to lead his horse around it. What he heard and what he saw produced such an impression that he went to the village president and asked him if he had any authority in regard to the building being moved on the street. The president told him he supposed not; that they did as they had a mind to, or something like that (Record, p. 45).

While the president, witness McGonegal, swears that he never observed anything to make him believe that the Quicks were habitually negligent, he admits that he has seen the capstan out very many nights, sometimes close up to the building and sometimes three or four rods away unlighted and unguarded; that when it was several rods away it would be on the side of the street, somewhere between the center of the street and the sidewalk, leaving plenty of room to drive past (Record, pp. 45 and 46). It was, evidently, still, however, in the traveled part of of the way, as the evidence shows that there are no side ditches along the streets (Record, pp. 38 and 42).

H. M. Church, one of the members of the council, while testifying that his attention had not been called to any misconduct or negligence on the part of the Quicks, testified that he had seen the capstan six rods from the building on the side of the street without a light on it. In that case it was out of the wagon track. There is no ditch there. If a team sheered out at one side they might have run into it; that he should think it was a dangerous position if a team became frightened; that he had seen capstan left out many times (Record, p. 42).

L. H. Ripley, another member of the council, testifies to but one instance of seeing building and capstan at night, and on that occasion the capstan stood *about* forty feet away from the building (Record, pp. 43 and 44).

W. W. Slocum, another member of the village council in 1886,

confines his testimony to the Bansett building at the time it stood in front of Squire Waldo's. He says he noticed it all the time for fear something might happen. We are informed by defendant's witness Baird, that at this time the building occupied 18 or 20 feet of a four-rod road, and that the capstan was the length of the sweep-away (Record, p. 38).

Now, if it can be contended that these village officials never had *actual* notice that the Quicks followed the dangerous custom of leaving their capstan in a dangerous condition and position, the fact that that custom was pursued whenever they observed the work was at least sufficient to put them on inquiry. They ought to have suspected that the custom they saw pursued was the usual custom.

The habit of the Quicks in leaving their capstan in a dangerous position was notorious. E. R. Burk ran into the capstan on Broad street when the Bansett building was being moved (Record, p. 13). James H. Patterson ran into the capstan in the center of Saginaw street when the Donaldson building was being moved (Record, pp. 14 and 15). William R. Jones ran into the rear end of the Bansett building on Broad street, and after he got around the building his horse ran into the capstan (Record, pp. 15 and 16). Albert M. Taylor ran into the sweep that was left in the capstan on Saginaw when the Donaldson building was being moved (Record, p. 16).

While the Bansett building was being moved on Broad street it was left two nights and a Sunday with the capstan on the opposite side of the street from the building, with a chain extending from one to the other. On Sunday a funeral procession passed over it. One of the conveyances had a team, of which one of the animals was a colt. They had a great deal of difficulty in getting over the obstruction. "After a while it went across, but it kicked and jumped around and broke the thills of the buggy." Later in the same afternoon some ladies driving a rig had a difficulty at the same place. "Their horse was afraid of the chain lying on the ground, and did not like to step over it" (Record, p. 24).

The Quicks, as already indicated, never took any care, nor did they take any pains, to conceal their negligence. On the most important streets in the village of Holly they pursued their negligent custom, to the knowledge of every one who made observation. Whenever the officials of the defendant corporation observed the Quicks they noticed their custom. They knew the capstan was left at night in the condition and position in which night found it. But, according to their testimony, they did not think this a negligent custom. They had noticed the capstan unlighted, unguarded and staked down in the street at varying distances from the building, in a position where, if a team got outside of the center, a collision would result. But they consoled themselves with the reflection that there was ample opportunity to get by, and there wasn't much traveling in the streets of the village (Record, p. 46). They evidently figured that while there was danger of a collision and of somebody being injured, yet the chances for escaping injury being thus favorable, there was no negligence. The village marshal, Mr. Herrick, at one time became zealous enough to consult the president. He asked the president whether it was his duty to watch the Quicks in their work. The president replied that the Quicks did as they had a mind to, and he knew of no ordinance making it his duty or that of the witness to watch them (Record, p. 45).

Was ever such negligence shown before? These officials, charged by law with the duty of keeping the streets of this village in a condition reasonably safe for travel, suspecting that the Quicks were pursuing a course that endangered the safety of travelers, advised each other to refrain even from making observation on the ground that they had passed no ordinance to carry out the duty which the law imposed upon them. Accordingly, Mr. Herrick, when he saw the Quicks moving the Reynolds building through the streets of the village, interposed no objection, gave no directions and exercised no watchfulness. The course taken by these defendant officials, under these circumstances, was an approval of the method of work pursued by the Quicks.

I think we have demonstrated our propositions. There was evidence that William Quick had been engaged in moving buildings in the village of Holly for many years. That he left his capstan unlighted and unguarded, and staked down in the street in a position of danger, and that the officials of the defendant having notice of this negligent custom, took no precautions whatever to insure safety on the occasion of plaintiff's injury. The question next arises whether, as a matter of law, these facts constitute negligence.

Legal Argument.

Respecting the legal questions involved, we announce and propose to demonstrate the following propositions:

1. It is the duty of municipal corporations to keep their streets freed from obstructions which endanger the safety of public travel.

2. This duty requires that when municipal officers, charged with the duty of keeping the streets reasonably safe, have either actual or constructive notice of the existence of obstructions endangering public travel, they shall either remove the same or take steps to render them safe.

3. The officials of the village of Holly, charged with the duty mentioned in the last proposition, were the members of the village council, the marshal and the street commissioner.

4. The members of the village council, the marshal and the street commissioner, had such notice as to charge the village of Holly with the responsibility for Quick's neglect.

We shall discuss each of these propositions separately.

(1) It is the duty of municipal corporations to keep their streets freed from obstructions which endanger the safety of public travel.

Prior to 1879 there was no legal obligation on the part of municipalities in Michigan to keep their streets in a condition safe for public travel. See

City of Detroit vs. Blackeby, 21 Mich., 84.

In 1879 a law was passed (see Public Acts of '79, Act 244) which imposed this obligation. This act, so far as material to this controversy, is printed in brief of opposing counsel, pp. 23–25.

The act of 1879, above referred to, was in force at the time of plaintiff's injury.

Act 234 of the Public Acts of 1887 (set forth in brief of opposing counsel, pp. 23–25) repealed the act of 1879, and (so far as the case at bar is concerned) substantially reënacted its provisions.

In

Merkle vs. Bennington, 68 Mich., 135,
Alexander vs. Big Rapids, 70 Mich., 224,
Moore vs. Township of Kenockee, 75 Mich., 332,

it was expressly held that causes of action arising under the act of 1879 were not affected by the act of 1887.

Southwell vs. Detroit, 74 Mich., 438,
Joslyn vs. Detroit, 74 Mich., 458,

also proceed on this principle.

The important question arising under the statute, so far as our first proposition is concerned, is: Does it cover injuries arising from obstructions in the street? This question was decided in *Joslyn vs. City of Detroit*, 74 Mich., 458. There the Court decided that the city of Detroit, under the statute above quoted, was responsible for injuries occasioned by a collision with a pile of sand placed by a third party in the street, saying: "The statute was passed in May, 1879. It makes the city not only liable for injuries occurring through neglect to keep the streets in repair, but also for such as occur by reason of the neglect of the city to keep its streets in a condition reasonably safe and fit for travel. The duty is imposed in both cases, and the necessity for it exists in the one case just as much as in the other, and the liability is the same, and it is very manifest that the Legislature intended to make it so. It was the object of the Legislature in the passage of this statute to avoid the decisions of this court, by which, before the passage of the act, the law by construction was

made to relieve the municipality from all liability of this kind, and we think the statute should be so construed as to effect the object intended by the Legislature."

In the case of *Hayes vs. West Bay City*, 91 Mich., 418, it was held that the city was responsible for injuries sustained by colliding with a timber projecting from a building which was being moved through the streets of the defendant corporation.

(2) The duty of municipal corporations to keep their streets freed from obstructions requires that when the municipal officers charged with the duty of keeping the streets reasonably safe have either actual or constructive notice of the existence of obstructions endangering public travel, they shall either remove the same or take steps to render them safe.

It is apparent that the only question that demands discussion, our first proposition having been established, is that of the responsibility of municipal corporations for obstructions of which its officials have only constructive notice.

Prior to the amendment in 1887, which contained this proviso, "Provided, That in all actions brought under this act, it must be shown that such township, village or city has had reasonable time and opportunity after knowledge by or notice to such township, village or city that such highways, streets, bridges, crosswalks or culverts have become unsafe or unfit for travel, to put the same in a proper condition for use, and has not used reasonable diligence therein after such knowledge or notice," the courts uniformly held that constructive notice was sufficient to charge the municipality. See

Medina Township vs. Perkins, 48 Mich., 71.
Stebbins vs. Keene, 55 Mich., 557.

In the case of *Moore vs. Township of Kenockee*, 75 Mich., 332, heretofore cited, the question arose whether the proviso in the act of 1887 or that in the act of 1879 governed in the trial of cases which arose under the old act, but were not tried until the new became law.

The Court avoided a decision of this proposition by holding

that the construction of the two acts were the same; holding that under the proviso contained in the act of 1887 constructive notice was sufficient, saying: "The language of the statute is 'after knowledge by or notice to such township.' The word 'notice' is not used as synonymous with the word 'knowledge.' Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and, if a party omits to inquire, he is then chargeable with all the facts which by a proper inquiry he might have ascertained. This rule has long been established and is well settled in this State." * * The words of the act of 1879 would seem to make the township liable without regard to the question of notice, but the act has always been construed by this Court that it was only liable in case of negligence, and it could not be held to be negligent until after notice, actual or constructive, that the highways or bridges were out of repair, and the act of '87 evidently was framed to meet this view and not to impose new conditions."

In *Joslyn vs. City of Detroit*, 74 Mich., 459, heretofore quoted, there was no evidence of actual notice, but the Court held that the testimony that the obstruction was left in the street for some time was sufficient of constructive notice to charge the municipality. It is to be noted, too, that this was a case which arose under the act of '79, and was not tried until the act of '87 was enacted.

This principle is followed in the case of

Campbell vs. City of Kalamazoo, 80 Mich., 660.
Fuller vs. Mayor, 92 Mich., 205.
Blank vs. Livonia, 95 Mich., 229.

(3) The officials of the village of Holly charged with the duty mentioned in the last proposition were the members of the village council, the marshal and the street commissioner.

The village of Holly was incorporated by Act No. 352 of the Local Acts of 1881. That act, so far as material to this case, reads as follows:

"Section 1. The People of the State of Michigan enact, that

all that tract of country situated in the Township of Holly, County of Oakland, and State of Michigan * * * is hereby re-incorporated as a body corporate under the name and title of 'The Village of Holly' subject to and under the provisions of the general act for the incorporations of villages, being act number sixty-two or the session laws of eighteen hundred and seventy-five, and such amendments as may be made thereto, and in and by such name may sue and be sued and do all other acts and things provided for in said act."

Section 1 of Chapter 2 of Act No. 62 of the Laws of 1875 reads: "In villages incorporated subject to the provisions of this act the following officers shall be elected, viz: a president, six trustees, one clerk, one treasurer, one street commissioner, one assessor, and one constable; and the president and trustees shall constitute the village council."

Section 13 of Chapter 4 reads: "The village marshal shall be chief of police of the village. As police officer he shall be subject to the direction of the president of the council. It shall be his duty to see that all the ordinances and regulations of the council, made for the preservation of quiet, good order, and for the safety and protection of the inhabitants of the village, are promptly enforced. As peace officer he shall within said village be vested with all the powers conferred upon sheriffs for the preservation of quiet and good order."

Section 18 of Chaper 4 reads: "It shall be the duty of the street commissioner to perform, or cause to be performed, all such labor, repairs and improvements upon the highways, streets, sidewalks, alleys, bridges, * within the village, as the council shall direct to be done by or under his supervision; and to oversee and do whatever may be required of him in relation thereto by the council."

Section 7 of chapter 7 reads: "The council shall have supervision and control of all public highways, bridges, streets, alleys, avenues, sidewalks and public grounds within the village."

Section 20 of chapter 7 reads: "The council shall have power

to prohibit and prevent obstructions and incumbrances in, and encroachments upon, the public highways, streets, alleys of the village, and remove the same; and to punish those who shall obstruct, encumber, encroach or maintain any encroachment upon or in any such highway, street or alley, and to require all such persons to remove every such obstructions, incumbrance and encroachments."

Section 23 of the same chapter reads: "The council may regulate the use of public highways, streets, avenues and alleys of the village, subject to the right of travel and passage therein. * * They shall have authority to prohibit, prevent, remove and abate all nuisances therein, and to require the authors and maintainers thereof to remove the same, and to punish them for the creation or maintenance thereof, and generally to prescribe and enforce all such police regulations over and in respect to the public streets as may be necessary to secure good order and safety to persons and property in the lawful use thereof, and to promote the general welfare."

In the case of *Dundas vs. City of Lansing*, 75 Mich., 504, it was held that the members of the common council who had substantially the same power as was given to the members of the council of the village of Holly, that the marshal, who had substantially the same power as was given to the street commissioner of the village of Holly, had such duties that notice to them was actual notice to the municipality.

The Court said: "As the corporation can acquire no knowledge of defective streets and sidewalks except such knowledge as is possessed by the aldermen of the city or the city marshal or the street inspectors, who are the only agents having any duty to perform with reference to keeping streets in repair, it would seem to follow that knowledge of any such agents of a defect in the streets or sidewalks would be knowledge of the corporation, and that actual notice given to either of these agents of such defects would be notice to the corporation."

In *Fuller vs. Jackson*, 82 Mich., 480, without reference to the

particular provisions of the charter of that city, the Court said:

"Knowledge on the part of the street commissioner or aldermen was notice to the defendant. This was settled in this State in the case of *Dundas vs. City of Lansing*, 75 Mich., 499."

(4) The members of the village council, the marshal and the street commissioner, had such notice as to charge the village of Holly with the responsibility for Quick's neglect.

As already demonstrated, these officials had actual notice that Quick was moving his building through the streets by means of the capstan, and interposed no objection. This was actual notice to the defendant corporation (*Dundas vs. Lansing*, 75 Mich., 499). This was actual notice that the streets of the village of Holly were obstructed with the building and capstan, rendering it thereby dangerous to travelers, unless extraordinary precautions were taken. Moreover, these officials had actual notice that it was Quick's custom to leave his capstan at night, unlighted, unguarded and staked down in the street in a position of danger.

We might safely contend that the notice to the defendant that Quick was moving his building through the streets by means of the capstan, imposed upon the village an obligation to see that he exercised due care to protect travelers from injury by colliding with it.

In the case of *Indianapolis vs. Doherty*, 71 Ind., 75, it was decided: "When the city issues a permit to use and obstruct a street, it is the duty of the corporate authorities to see to it that the persons whom she authorizes to use her streets shall properly guard and protect such obstructions, and if she negligently fails to perform this duty, she is responsible to one who is injured while properly using such streets and who is at the time exercising due care."

The above doctrine was approved in *Lincoln vs. Walker*, 18 Neb., 244.

In *Masterson vs. Mt. Vernon*, 58 N. Y., 395, it was held that the municipal corporation was not responsible for the neglect of a licensee who made an excavation in a street, but "if excava-

tions are made in streets by lot owners to whom permits to connect sewers, or any other lawful purpose, which may render the streets dangerous, or there is reason to believe that such excavations may be made, the officers of the defendant should exercise reasonable care under the circumstances to prevent injury. If such care was omitted, the defendant was responsible."

In the case of *Hayes vs. West Bay City*, 91 Mich., 420, it was held that the corporation was responsible for the negligence of a licensee to move a building through the streets where the license provided that the building should be moved under the supervision of the city marshal.

It is true the foregoing cases were cases of express license. In the case at bar the license was not express, but was implied from the fact that the corporate authorities, after knowledge that the building was being moved, permitted its continuance. (See *Chicago vs. Robbins*, 2 Black, 418.) The obligation of the municipality to guard an obstruction or excavation licensed by implication can not be different from its obligation toward one expressly licensed, and the authorities recognize no such distinction.

Says the Supreme Court of Minnesota in the case of *Grant vs. Stillwater*, 35 Minn., 242, in respect to its obligation to guard obstructions placed in the street by third parties: "As to the duty of the city in this respect, it could make no possible difference whether this material was placed in the street with or without a license from the city; in either case, if it was deposited or kept in such condition as to render the street unsafe and dangerous, it would be the duty of the city to cause the street to be made safe; and if it neglected to do so, after it had notice and was chargeable with notice of the facts, and injury resulted to any person from this neglect, the city would be liable."

We quote from the opinion of the Court in the case of *Parish vs. Eden*, 62 Wis., 282: "The plaintiff's intestate was killed on Monday night. Up to the preceding Saturday the highway at that point was in good repair, but on that day the same was dug

up by the servants of the railroad company, and ditches were excavated in or near the traveled track, rendering the road defective and unsafe for travelers, and that same Saturday the overseer of the road, learning the condition in which such highway was situated, saw its condition and required the foreman of the men at work there for the railroad company to restore it to its former condition. The foreman thereupon set some of his men at work to level the highway, and the overseer left the place and did not return to it. This was actual notice to the proper town officers of the defective condition of the highway, and eliminates from the case the necessity of considering the question of constructive notice. * * It was the duty of the overseer to see to it that the highway was restored, and nothing short of that will relieve the town from liability to travelers."

In *Chicago vs. Robbins*, 2 Black, 418, it was held that where the city had been compelled to pay damages in consequence of the negligence of one who excavated streets under an implied license, the city might recover the amount of the judgment from the negligent licensee. It appears, from the report of that case, that the licensee, Roberts, without any express permission of the city, but under an implied license, made an excavation in the sidewalk. This excavation was insufficiently covered, and a traveler fell into it and received injuries. The injured traveler brought suit against the city of Chicago and recovered damages.

We fail to find any report of the original case, but it certainly proceeded upon the theory that the municipality was chargeable with the duty of protecting travelers from the consequence of the failure of the licensee to properly guard the dangerous excavation, and this Court approves that doctrine by its reasoning in that case.

Smith vs. Leavenworth, 15 Kansas, 87, is a similar case, and so it seems to us is the case of *Joslyn vs. Detroit*, 74 Mich., 458.

It may be that it would be more accurate to describe William Quick as a wrongdoer, placing an obstruction in the street, than as a licensee by implication. While we think that he was to be

treated as a licensee by implication, it is sufficient to say that if he was a wrongdoer, and the authorities of the defendant corporation took no steps to abate the nuisance created by him after notice to them, the liability of the corporation would be, if anything, clearer than if he were a licensee by implication.

Hume vs. Mayor, 74 N. Y., 264.

Reasoning by analogy from other cases, it would seem that a municipality does not perform its entire duty of keeping its streets safe when it devolves entirely upon one licensed to obstruct them the duty of taking all the extraordinary precautions required to prevent injuries. If it cannot be assumed that one who deposits building material in a street will properly guard it, *Joslyn vs. Detroit*, 74 Mich., why should it be presumed that one who leaves a building and capstan in a street will properly guard them?

In the case at bar, no precaution whatever, not even the precaution of direction, was taken on the part of the municipal officers. If we are right in the foregoing argument, if the municipality owes a duty to protect the traveling public from an obstruction licensed by it of any kind whatever, the defendant is liable in this case. But it is only necessary to contend in this case that when a municipal corporation has constructive notice that a licensee who obstructs a street is neglecting to properly guard it, it is liable for such neglect. The officials of the defendant corporation had notice on various occasions that William Quick left his capstan unlighted, unguarded and staked down in a dangerous position in the streets. They had been informed of his negligence in this regard. They had discussed it among themselves and concluded that, as there was no ordinance, they had no duty to perform. Quick was in the habit of leaving his capstan in this dangerous condition in the most important streets in the village. This habit was well known, and had been noticed by nearly every person having any occasion to observe his work.

There was imposed upon these officials not simply the duty of

remedying dangers observed by them, but a duty of watchfulness to discover dangers which might be anticipated and discovered by the exercise of a proper degree of watchfulness. Says Chief Justice Graves in *Medina vs. Perkins*, 48 Mich., 71: "The general duty of a township is to exercise through its officers a reasonable supervision over its ways and bridges, and within fairly practicable limits to be watchful of their condition and trustworthiness, and see that they are kept in a reasonably safe condition for public travel. Its officers may not ignore the dictates of common sense and the lessons of ordinary experience, and refuse to see or refuse to heed what others see and others understand."

Says Mr. Chief Justice Sherwood in *Stebbins vs. Keene Township*, 55 Mich., 557: "It is made their special duty, when these defects exist, or are likely to exsit, to examine and ascertain them, and immediately make the necessary repairs. It is only necessary for an injured party to show upon the subject, by proper testimony, knowledge on the part of the officers of such a state of facts as reasonably and necessarily makes it their duty to examine and act, in order to protect the traveling public, and their neglect so to do."

Says Chief Justice Morse in *Southwell vs. City of Detroit*, 74 Mich., 450, in discussing a similar question, viz., the question of barriers or lights around an excavation: "The question next arises, what notice must the city have of this want of barriers or lights or other guards to warn the people of the condition of the street? If the city had been doing this work by its own officers, there would be no necessity for proof of actual notice, or of a lapse of time to dispense with proof. * It was only bound to ordinary care and prudence. I think, at the beginning of the excavation, the city would have a right to expect that the paving company would fulfill its agreement, and sufficiently protect the street. The city would have a right to suppose that the barriers provided by contract would be erected and maintained (*King vs. Cleveland*, 28 Fed. Rep., 838). If, however, the city permitted

the contractors to go on with their work without such barriers or guards for any great length of time, the law would imply a notice to the city that the contract was not being performed in this respect, and that the street was in a dangerous condition, and if such barriers were not maintained, or guards or lights kept, to warn people of such dangerous condition for such a period of time that the officers of the city, in the exercise of ordinary care and diligence, ought to have known it, the city would be liable for damages resulting from the negligence of the contractors."

In *King vs. Cleveland*, 28 Fed. Rep., 838, it was held that the city was chargeable with constructive notice that one maintaining a pile of brick in the street was failing to keep up a light from the notoriety of the fact of the omission.

"Though a city giving license to pile building materials in the street is entitled to notice of danger therefrom to passers by, such notice is implied by the open and continuous neglect of the builder."

Magee vs. Troy, 1 N. Y., Supplement, 24.
Affirmed 119 N. Y., 640.

So constructive notice may be inferred from the fact that the custodian of premises is in the habit of leaving his cellar door opening into the street open and unguarded.

Chapman vs. Mayor of Macon, 55 Ga., 566.
Philbrick vs. Niles, 25 Fed. Rep., 265.

If, therefore, to charge a municipality by reason of the failure of one who obstructs the street under a license, it is necessary to show constructive notice of his failure, it is sufficient to show that such licensee was habitually negligent in that regard. In the case at bar, however, we go further and show that the officials of the municipality had themselves observed this negligent custom; had discussed it and reached the conclusion that they could do nothing. But it is urged that the prior negligence of Quick was not notice under the Michigan statute that he would be negligent on this occasion. There are several answers to this argument:

(*a*) If the argument heretofore advanced in this brief that a municipality is chargeable with the duty of watchfulness respecting licensed obstructions in its streets, then the knowledge of that obstruction on the part of its officers is sufficient to put this defendant corporation upon inquiry. The knowledge that the building and capstan were in the streets was constructive notice.

(*b*) The argument is itself unsound. It is based on the ground that the Supreme Court of Michigan has decided "that it is not material or competent to prove that the municipality had neglected to repair other defects or imperfections not in the immediate vicinity of the defect or imperfections that caused the injury."

Dundas vs. City of Lansing, 75 Mich., 499.
Tice vs. Bay City, 78 Mich., 209.

We submit that these decisions have no application whatever. The neglect to discover and repair one defect obviously has no tendency to prove negligence in relation to another defect. A defect in one sidewalk has no tendency to establish a defect in another sidewalk. These cases do not rest upon the statutes of Michigan; they are based entirely upon general reasoning. Notice, however, that a particular person is generally negligent ought to charge one with notice that he will be negligent on a particular occasion. This is well settled doctrine; this is the ground upon which a master's liability to his servant for the negligence of a fellow servant rests.

That the Supreme Court of Michigan, in the decisions relied upon, do not intend to modify the doctrine that "whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand" is indicated by the following cases.

Campbell vs. Kalamazoo, 80 Mich., 661.
O'Neill vs. West Branch, 81 Mich., 546.
Fuller vs. Mayor, 92 Mich., 205.

In the case last above cited it was conceded by plaintiff's counsel "that there was no evidence showing that this particular defect which caused the plaintiff's injury had existed for any length of

time, so as to warrant a constructive notice to the city of this particular plank being broken," but it was claimed "there was plenty of evidence showing both actual and constructive notice to the city of the unsafe and defective condition of the sidewalk mentioned in plaintiff's declaration, and that notice of the general broken, smashed and torn condition of the walk was, in law, notice of all its particular defects." The court sustained this contention.

In the case of *Blank vs. Livonia*, 95 Mich., 229, decided by the Supreme Court of Michigan, April 7, 1893, it is said that "whatever fairly puts a party upon inquiry must be regarded as sufficient notice where the means of knowledge are at hand; and where he omits to make use of such means of knowledge, he is chargeable with knowledge of all the facts, which, by proper inquiry, he might have ascertained."

In that case it was shown that a few months before plaintiff's injury the highway commissioner had made an examination of the bridge there in question, and found that one of the stringers was defective at the point upon which the principal strain of the bridge came. The other stringer, which subsequently broke, occasioning plaintiff's injury, was apparently sound, but was defective at the same point, the defect being a latent one.

The Court said in respect to the duty of the commissioner to make an examination at this particular point: "It would seem that it was one of the places that an ordinarily prudent man would have examined when he found that one was defective; at least it was a question for the jury to determine whether there was not a sufficient notice to the commissioner to put him upon inquiry as to the condition of the other stringer at this place when he found the east one was defective and that it had to be removed. It might have been discovered that the west stringer was also defective. Though the defect was a latent one, the question was a particular one, and under the circumstances was for the jury to determine whether the officers of the township used the diligence necessary in ascertaining the condition of the bridge."

We submit that according to the Michigan decisions constructive notice under the statute is what would constitute constructive notice anywhere; that whatever fairly puts a party upon inquiry is, where the means of knowledge are at hand, sufficient notice.

Moore vs. Kenockee, 75 Mich., 332.
Blank vs. Livonia, 95 Mich., 229.
Medina vs. Perkins, 48 Mich., 71.
Stebbins vs Keene, 55 Mich., 557.
Campbell vs. Kalamazoo, 80 Mich., 661.
Fuller vs. Mayor, 92 Mich., 205.

In

King vs. Cleveland, 28 Fed. Rep., 838,
Philbrick vs. Niles, 25 Fed. Rep., 265,
Magee vs. Troy, 1 N. Y. Supplement, 24,
Chapman vs. Mayor of Macon, 55 Ga., 566,

as well as in the opinion of Chief Justice Morse in the case of *Southwell vs. Detroit*, 74 Mich., 445, it is held that habitual negligence of one obstructing a street is constructive notice to the municipality. The case at bar, in its facts, goes beyond any of the foregoing cases. Here was not merely evidence of negligence on this occasion—not merely evidence that William Quick was notoriously habitually negligent, but the officials of the defendant corporation—the president, marshal and several members of the council—had themselves observed instances of this negligent custom. It had been a matter of discussion between the president and the village marshal, and the president said, speaking of the Quicks, "They did as they had a mind to."

Now, when these officials knew, as they testified that they did know, that William Quick was moving this building through the streets, they were clearly put upon inquiry, and the means of knowledge as to how he was leaving his capstan was at hand.

The case of *Griffin vs. Mayor*, 9 N. Y., 456, cited in brief of opposing counsel, is directly opposed to the case of *Joslyn vs. Detroit*, 74 Mich., 458, and has in effect been overruled by the case of *Magee vs. Troy*, 1 N. Y. Supplement, 24, affirmed 119 N. Y., 640.

The cases cited in said brief in which the municipality is charged with negligence in the exercise of its legislative power have no application to the case at bar. (See *Grant vs. Stillwater*, 35 Minn., 242.

This disposes of all the questions raised by the exceptions to charge and refusal to charge, except those arising out of the refusal to give the 11th and 13th requests.

Negligence of Wm. Quick.

It is claimed by the eleventh request that there was no evidence that William Quick frequently left this capstan in a dangerous condition in the streets of the village of Holly. A reference to our brief and the citations to the records therein made, wherein is discussed the habitual negligence of William Quick, shows that substantially all the evidence offered concerning the negligence of the Quicks in leaving their capstans related to the buildings moved by William Quick either alone or in connection with one of his brothers. William Quick moved the Donaldson building in October, 1886 (Record, p. 24).

He moved the Bansett building in the summer of 1886 (Record, p. 39).

He moved the Jenkins and Van Every building (Record, p. 22).

He moved the Church building (Record, p. 21).

He moved the Kelly-Quick building (Record, p. 20).

Pleading.

Error is assigned upon the refusal to give request 13.

That request reads; "The declaration in this case is not based upon the Michigan statute on the subject." The pleadings in this case (See Revised Statutes, section 914) should conform to the Michigan practice.

See Chemung Canal Bank vs. Lowry, 93 U. S., 72.
Lewis vs. Gold, 13 Blatchford, 216.

The ground upon which this request was asked, and upon which

it will be contended that it was error to refuse to give it, is that no reference is made to the Michigan statute. This same objection was made in the case of *Hayes vs. West Bay City*, 91 Mich., 418, and the Court there say: "The declaration was sufficient as against the city without counting upon the statute, as it contained all the necessary averments to bring the case within the statute."

In that case the declaration alleged that the defendant negligently permitted a wooden building, which was moved into Henry street, to remain in said street the night of September 19, 1889, with a timber projecting from under the same, without any lights, danger signals, or other suitable warning to persons passing along, over and on said street.

The first count of this declaration in this case (Record, p. 4) avers that said defendant, wrongfully, injuriously, and negligently allowed and permitted one William Quick to draw a barn through said street, and have a capstan in the middle of said street, * * and wrongfully, and injuriously, and negligently allowed said William Quick to have said capstan in said street, and during the night time of that day without fixing, or placing, or causing to be fixed and placed any light or signal at or near said obstruction to denote or show that the same was there as aforesaid." The second count avers that said defendent "wrongfully, negligently, and knowingly and injuriously allowed and suffered a certain capstan to be and remain in the center of said Oakland streets * * with no light or signal at or near said capstan to show or denote that the same was there as aforesaid." See also

Fuller vs. Jackson, 82 Mich., 480.
Grand Rapids, Etc., R. R., vs. Southwick, 30 Mich., 446.

ADMISSIBILITY OF TESTIMONY.

But two questions arise on the admissibility of testimony. The street commissioner of the village corporation was asked:

Q. Did you take any steps to have a light or guard put around it? A. No, sir.

After this answer was given, the defendant objected to the question as incompetent and immaterial. The court overruled the objection. We submit, without argument, that the testimony was admissible.

Witness Evans testified that he was one of the councilmen of the village elected the spring preceding the trial which occurred in July, 1889 (Record, pp. 6 and 7).

He was asked this question: Q. Prior to your being elected a member of the council, did you learn in any way that the Quick Bros. were in the habit of leaving unguarded and exposed capstans in the street? This was objected to and excluded. He was then asked this question: Q. Prior to the accident of Dr. Hunter, as a citizen of that village, had you any reason to believe that the Quick Bros., when they moved buildings would leave their capstan in an exposed and dangerous position? To this question witness answered without objection, "I had not" (Record, p. 33).

Surely the issue in this case only involved the negligence of the Quicks, and its notoriety prior to the time of plaintiff's injury and a question framed to evoke an inquiry into that issue was answered by the witness.

Explanatory Statement.

As a matter of fact, the statement in the bill of exceptions that this case was tried before the Hon. Howell E. Jackson, Circuit Judge, and Hon. Henry B. Brown, District Judge (See Record, p. 7), is not true. The statement at the head of the bill of exceptions on page 9 that the case came on for trial before the Hon. Henry B. Brown, District Judge, is true.

The fact is that this case was tried by jury three times, and the legal questions therein involved were argued twice before Judges Brown and Jackson sitting together. On the first trial the evidence as to the negligence of the defendant was not nearly as strong as it was on the second and third trials. Before the second trial, at the suggestion of Judge Brown, the question of

whether a sufficient case was made for the consideration of a jury was argued before Judges Brown and Jackson. They were both of the opinion that such a case was made. After the second trial in consequence of the decision of *Bucher vs. Cheshire Railroad Company*, 125 U. S., 555, the question was argued as to whether that decision was an authoritative determination that the Federal courts sitting in Michigan should follow the decisions of the Supreme Court of Michigan respecting the liability of municipal corporations for injuries occasioned by defective streets.

It was assumed at that time, in consequence of the decision of *Agnew vs. Corunna*, 55 Mich., 428, and *MacArthur vs. Saginaw*, 58 Mich., 357, that the statutes of the State of Michigan imposed no liability for injuries occasioned by obstructions in the street. In the interval that elapsed between that argument and the third trial the Supreme Court of Michigan decided *Southwell vs. Detroit*, 74 Mich., 438, and *Joslyn vs. Detroit*, 74 Mich., 458.

In consequence of these decisions it was the opinion of the learned trial judge, that the statutes of Michigan afforded plaintiff a remedy, and acting upon this opinion, he refused to give plaintiff's 13th and 14th requests. The learned counsel for plaintiff in error is mistaken, therefore, when he says there was no attempt to recover or pretense of recovering on any State statute on the subject.

We submit that the judgment should be affirmed.

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